90-1322

No. _____

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In The

Supreme Court of the United States

October term, 1990

SNOW MOUNTAIN PINE COMPANY

Petitioner,

– against –

THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

Respondents,

and

C.P. NATIONAL CORPORATION,
a California corporation

Respondents,

and

OREGON TRAIL ELECTRIC
CONSUMER'S COOPERATIVE, INC.

Intervenor/Respondent.

Petition For Writ Of Certiorari To The Supreme Court For The State Of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The various *Snow Mountain Pine Company*[1] cases are landmark in interpreting The Public Utility Regulatory Procedures Act of 1978 (PURPA) 16 U.S.C. § 824a-3 (1978) Pub.L.95-617, 92 Stat. 3117.[2] That program was designed by Congress to remedy this country's dependence on foreign fuel. Congress mandated utilities to offer to purchase and to purchase industrial by-product power. The program was delineated by the Federal Energy Regulatory Commission (FERC) to be implemented and enforced by the states.[3]

PURPA imposed duties upon the state regulatory commissions which may be contrary to their charge under state law. PURPA could impose hardship for utilities and consumers. It could deprive utilities of the assured rate of return upon future generation assets. FERC pricing methodologies generally required the PURPA payments be front loaded, raising consumer rates in the first years of a PURPA sale. 45 Fed. Reg. 12,224 (1980).

Snow Mountain Pine Company (Petitioner) has litigated against the state of Oregon for seven years in order to obtain enforcement of PURPA to obtain the tariff price

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[1] *Infra* at page ix.

[2] The Federal Energy Regulatory Commission (FERC) issued implementing regulations. 18 C.F.R. 292.203 et seq. with Commentary and Guidelines. 45 Fed. Reg. 12,214 (1980).

[3] This case involves the implementation of PURPA in Oregon. Oregon adopted legislation and regulations. Or.Rev.Stat. 758.500-550. 84 Or. Admin. R. part 24.

QUESTIONS PRESENTED FOR REVIEW – Continued

entitlement, which it would have received had its local utility, C.P. National Corporation (CPN), acted lawfully on and after July 6, 1983. It was on that date that Petitioner made a *bona fide* tender of a PURPA contract which CPN rejected. This appeal is taken from various judicial decisions which have held that avoided cost tariffs in effect on the date of a tender of power are not binding. In 1988, the Oregon Public Utility Commission (Oregon PUC) concerned with ratepayer burdens, retroactively lowered the estimates made in 1983 of CPN's future power costs (CPN's "avoided costs"). The Oregon PUC reversed both its policies and the fact finding made by the Oregon PUC in 1982 that CPN would not be an "all requirements" utility for the term of this power sale.[4] The new rates were so low they removed the project's feasibility. The Oregon PUC asserts now that the original 1983 rates exceeded the full avoided cost level, and were thereby preempted by federal law.[5]

The narrow holding of the Snow Mountain cases is that federal law vests a co-generator with a right to the avoided costs **as of** the date of its tender of contract; but, the published avoided costs in effect **on** that date are not binding, either as a mathematical starting point or as an ending point.

The proposition proved by the case is that a recalcitrant utility can avoid its PURPA responsibility when a regulatory commission, concerned with ratepayer protest,

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[4] See, Order 88-1419 *infra* at p. 9.

[5] *Id.*, at p. 20.

QUESTIONS PRESENTED FOR REVIEW – Continued

retroactively deems an avoided cost tariff to be "higher than full avoided cost." A cogenerator may be subjected to lengthy proceedings and deprived, at any time, of the price which it "locked in" under PURPA.

THE QUESTIONS PRESENTED FOR REVIEW ARE:

1. Does PURPA impliedly or expressly contain due process concepts which preempt state action which might subject cogenerators to lengthy proceedings, engage in retroactive ratemaking, and rely upon changed policy to deprive a cogenerator of the prices which would have been paid had the utility complied with the law when the power tender was made?

2. Can states advance low estimates of avoided costs retroactively, and divest cogenerators of higher payments by 'finding' that the higher prices exceed the "full avoided cost level"?

3. Are the Public Utility Commissioners of the various states, who are charged by federal law with the enforcement of PURPA, thereby required to give primacy to federal law over contrary state duties to protect ratepayers.

4. Does 16 C.F.R. 292.304(e)(1)-(4), allowing project specific *adjustments* in generic avoided cost prices; or 18 C.F.R. § 292.403(b), allowing FERC to waive current avoided costs prices, present the limits to avoided cost price adjustments which may be made by state commissioners?

RULE 29.1 STATEMENT AND LISTING OF PARTIES

Snow Mountain Pine Company, is an Oregon Partnership of Raymond Feichtmeir and Pentron Corporation, Inc., a corporation of the state of Washington. The following are affiliates of Pentron Corporation: Tecton Corporation.

Parties to this litigation are:

1. Snow Mountain Pine Company/Appellant;
2. The State of Oregon/Respondent;
3. C.P. National Corporation/Respondent;
4. Oregon Trail Electric Consumer's Cooperative, Inc./ Intervenor-Respondent.

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Snow Mountain Pine Co. v. C.P. Nat'l Corp., 64 PUR 4th 166 (Or. P.U.C. Nov. 13, 1984) (No. UM 11, 84-895). (Reported Order, establishing contract, prices and options for Snow Mountain to create purchase obligation).

Snow Mountain Pine Co. v. C.P. Nat'l Corp., Case No. UM 11 (Or. Pub. Util. Com'n.) (1985) (No. UM 11, 85-024). (Unreported Order, extending deadline for contract signing).

Snow Mountain Pine Co. v. C.P. Nat'l Corp., Case No. UM 11 (Or. Pub. Util. Com'n.) (1985) (No. UM 11, 85-037. (Unreported Order, extending deadline for contract signing).

Appellate Review By Oregon Courts:

Snow Mountain v. Maudlin, Public Utility Commission of the State of Oregon, C.P. National Corporation, and Idaho Power Company, No. A 8501-00567 (Letter Decision, from Hon. William C. Snouffer, Circuit Court of Oregon For Multnomah County (September 30, 1985) (reversing portions of contract, finding promissory estoppel and entitlement to avoided cost schedule on file on July 6, 1983). **Unreported.**

THE DECISIONS BELOW: REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS – Continued

Snow Mountain Pine Co. v. Maudlin, 84 Or. App. 590, 734 P.2d 1366 (Or. App. April 8, 1987) review denied, 303 Or. 591, 739 P.2d 571 (1987) (affirming except as to price, with remand to determine "actual avoided costs" as of July 6, 1983).

1988 Commission Proceedings:

Snow Mountain Pine Co. v. C.P. Nat'l Corp., Case No. UM 11 (Or. Pub. Util. Com'n.) (February 8, 1988) (No. UM-11, 88-153). (Unreported Order, denying preliminary motions).

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Snow Mountain Pine Co. v. C.P. National Corporation, 100 PUR 4th 190 (Or. P.U.C., Dec. 5, 1988) (No. UM-11, 88-1419). (Reported Order, establishing lowered avoided costs for July 6, 1983 for Snow Mountain).

Judicial Review of Agency Orders:

Snow Mountain Pine Company v. Public Utility Commission, C.P. National Corporation, and Oregon Trail Electric Consumers Cooperative, Inc., No. A8812-06809, (Decision Letter from Hon. William C. Snouffer, Circuit Court of Oregon for Multnomah County (July 31, 1989) (affirming). Unreported.

Snow Mountain Pine Company v. C.P. National Corp., 102 Or. App. 687, 795 P.2d 611 (Or. App. August 1, 1990) (per curiam) review denied, 310 Or. 612, 801 P.2d 840 (November 20, 1990). (Table).

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**Petition For Writ Of Certiorari To
The Supreme Court For The State Of Oregon**

PETITION FOR WRIT OF CERTIORARI

Snow Mountain Pine Company petitions the United States Supreme Court to issue a Writ Of Certiorari to The

Supreme Court of the State of Oregon for review of the decisions set forth below.

Snow Mountain Pine Company Respectfully files this Brief In Support of Its Petition For Writ Of Certiorari Set Forth Herein.

JURISDICTIONAL STATEMENT

(i) Date of Decree and Time of Entry: August 1, 1990. (Time unknown).

(ii) Date of Order respecting Rehearing: November 20, 1990.

(iii) Statutory provisions conferring Jurisdiction For Issuance of Writ of Certiorari:

The Supreme Court is granted jurisdiction under 28 U.S.C. 1257(a)(1988). Petitioner claims a right and privilege specially set up under the Constitution and statutes of The United States and the authority exercised thereunder. Petitioner claims that such rights were taken by state action without compensation or due process. The state action divesting Petitioner of those rights presents issues of critical importance, upon which Courts have reached conflicting results.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS[6]

Constitutional Provisions

The Supremacy Clause of the United States Constitution makes the statutes set forth below binding upon the judges of the states. U.S. CONST., art. VI cl. 2. Appendix (App.) A1. The United States Constitution protects Raymond Feichtmeir of Snow Mountain Pine Company against deprivation of vested property rights, including valuable contract rights without adequate compensation and due process of law. *U.S. Const. amend. V; U.S. Const. amend. XIV.* (App. A1 and A2, respectively).

Statutes

This case involves § 210 of The Public Utility Regulatory Procedures Act of 1978, 16 U.S.C. 824a-3 (1978) (PURPA)[7] and 18 C.F.R. Part 292 (1987).

Administrative Regulations and Guidelines

18 C.F.R. § 292.301.[8]

18 C.F.R. § 292.302.

18 C.F.R. § 292.292.304(d)(2)(ii).

18 C.F.R. § 292.305.

18 C.F.R. § 292.403(b).

45 Fed. Reg. 12,214 (1980).[9]

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[6] The following appear verbatim in Appendix A.

[7] App. A2.

[8] Sections of 18 C.F.R are set forth verbatim at A12-A23.

[9] The cited sections of 45 Fed. Reg. are set forth verbatim at A23-A29.

45 Fed. Reg. 12,218 (1980).

45 Fed. Reg. 12,219 (1980).

45 Fed. Reg. 12,224 (1980).

State Administrative Regulations Implementing Federal Program

Or. Admin. R. 860-29-001 et seq.[10]

STATEMENT OF THE CASE

Introduction.

Questions of national energy policy could not be more timely presented. This case presents the possibility that states may interpret federal law to require the retroactive lowering of avoided costs to deprive cogenerators of certainty with respect to expected streams of payment. The PURPA program depends upon encouragement of tenders of power, speedy and inexpensive enforcement of PURPA rights and fixed long term prices which may be assigned to a lender as security for financing. This case divests the program of these elements. The ability of Congress to address the energy crisis through PURPA is called into question by the interpretation of PURPA given by the Oregon courts.

Factual Background.

The case involves a utility which was unwilling to comply with federal law and a state regulatory commission unwilling to enforce federal law.

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[10] Or. Admin. R. Part 29 is set forth verbatim at A29-A66.

Pursuant to PURPA, Oregon adopted implementing regulations and orders.[11] Oregon statute even allowed avoided costs to be set higher than full avoided costs if necessary to encourage cogeneration.[12] In July of 1982, the Oregon PUC made a factual finding that CPN would not be able to obtain power from its supplier, Idaho Power Company, after 1984. After that, CPN would bear costs equivalent to generating utilities. The Oregon PUC directed CPN to use the filed avoided cost data of its supplier (the Idaho Power Company) as the best estimate of the generating costs to be incurred by CPN but for the purchase of cogenerated power.[13] Beginning in July of 1982 and throughout 1982 and 1983, CPN abided by those orders and filed the avoided costs of Idaho Power Company, as its own.[14] These Orders were treated as tariffs. CPN was to be allowed to use other avoided costs, once filed and approved, on a prospective basis.[15]

Oregon had implemented PURPA by posting approved avoided cost **prices** which cogenerators could lock-in. The pricing Orders adopted in Oregon were in the form of work-sheets which computed prices based upon whether the power was firm or non-firm, the length

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[11] 84 Or. Admin. R. Part 29.

[12] Oregon Revised Statutes (Or. Rev. Stat.) 758.530(2); 758.525(2); and 758.545(1)(b). App. A71, A74 and A76.

[13] Ordered by letter from John J. Lobdell to Rick Jarrett of CPN, dated August 26, 1982. App. C3.

[14] Letters of J.P. Paris, C.P. National Corporation, to John J. Lobdell, Oregon Public Utility Commissioner (February 14, 1983 and June 24, 1983). App. C1 and C2.

[15] *Id.* App. C4.

of the committment to sell power and other factors.[16] Such orders calculated with a "reasonable degree of certainty" the prices which a cogenerator could expect to lock-in.[17] In Oregon, PURPA contracts merely included the schedules of prices determined by the worksheets.

In May of 1983, Petitioner commenced negotiation with CPN to sell cogenerated electricity from its qualifying facility in Oregon. On July 6, 1983, Petitioner tendered a contract to legally obligate itself to provide electricity on a firm basis for twenty-five years. The next October, after CPN had previously recognized its duty under law to buy the power, and after Petitioner purchased the turbine generators, CPN unlawfully informed Petitioner that it refused to buy power, refused to wheel the power to another utility and refused to negotiate. Petitioner sought informal resolution by the Oregon PUC, but the Oregon PUC directed Petitioner to file a complaint. A year-long proceeding followed. The Oregon PUC established a docket and set schedules for hearings in which the costs and plans of the Petitioner were subjected to scrutiny. An initial enforcement Order (Order 84-263) was issued on April 6, 1984 in which the Oregon PUC ruled that PURPA required CPN to purchase the power and that CPN's concerns about additional cost resulting from the sale could be addressed with contract provisions.[18] On November 13, 1984, a final Oregon PUC Order was issued with a contract attached and newly

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[16] Or. Admin. R. 860-29-090 and attached worksheets. App. A55-A66.

[17] 45 Fed. Reg. 12,218 at App. A24, see also pp. A24-A28.

[18] App. B67.

created price schedules included. This Order held that no PURPA obligation had previously existed. The Oregon PUC ruled that the obligation was incurred by reason of the Order, not federal law. The November 1984 avoided costs for CPN were held to be applicable in order to protect ratepayers. The Order allowed the Petitioner to invoke PURPA rights only by signing an attached power sale contract. The Order provided a deadline for signing the contract, after which, CPN would be released from any PURPA obligation by effect of the Order.[19] Furthermore, the Contract's binding nature was expressly conditioned upon approval by CPN.[20]

The next seven years involved appeals of this matter and brings Petitioner to this Court. Upon a complaint against the Commission for review, Snow Mountain obtained reversal of the November 1984 price schedule, and obtained removal of the offensive contract provision. The Circuit Court of Oregon for Multnomah County awarded Petitioner the higher avoided cost prices posted for use and in effect on July 6, 1983, the date of the "legally incurred oblication."[21] The Court held that the law created the purchase obligation on that date. The

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[19] App. B58, B66.

[20] *Snow Mountain v. Maudlin, Public Utility Commission of the State of Oregon, C.P. National Corporation, and Idaho Power Company*, No. A 8501-00567 (Letter Decision, from Hon. William C. Snouffer, Circuit Court of Oregon For Multnomah County (September 30, 1985). App. B54, B55 and B56.

[21] Federal regulation provides that full avoided cost prices based upon approved avoided cost data can be locked-in by the election of cogenerators upon creating a "legally

(Continued on following page)

Commission's ratepayer concerns were rejected.[22] The Circuit Court interpreted federal law to recognize that Petitioner had an entitlement to the published avoided costs *in effect on* July 6, 1983.[23] On further appeal, however, the Oregon PUC was directed by the Oregon Court of Appeals to retroactively create an avoided cost schedule for 1983. That Court granted the Commissioner's request for permission to adjust the 1983 rates to address ratepayers concerns.[24] The Court observed that federal regulations permitted adjustments to the rates for certain project specific factors.[25] The Court held that the "actual" avoided costs for a given project could differ from the filed schedules. Language in the Opinion held both that

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(Continued from previous page)

enforceable obligation." 18 C.F.R. § 292.304(d)(2)(ii). App. A19. The FERC *Commentary* clearly views this as an entitlement and central basis of the PURPA program. 45 Fed. Reg. 12,224 (1980) App. A26, A27.

[22] B54 and B56.

[23] *Snow Mountain v. Maudlin, Public Utility Commission of the State of Oregon, C.P. National Corporation, and Idaho Power Company,* No. A 8501-00567 (Letter Decision, from Hon. William C. Snouffer, Circuit Court of Oregon For Multnomah County (September 30, 1985). App. B53-B55.

[24] FERC regulation contemplates an application to FERC for waiver of avoided cost rates when such are not necessary to encourage cogeneration under 18 C.F.R. § 292.403(b). Federal and State regulation also contemplated the non-levelization of power purchase prices upon application of a utility so as to remove the front-loading which allows contract payments to parallel debt repayment if such is necessary. Or. Admin. R. 860-29-040(7). These procedures were not considered by the Oregon PUC or reviewing courts.

[25] *Snow Mountain Pine Co. v. Maudlin,* 84 Or. App. 590, 734 P.2d 1366 (Or. App. April 8, 1987) review denied, 303 Or. 591, 739 P.2d 571 (1987). App. B48-B49.

the filed schedules must be the starting point for determination of "actual" avoided costs; but also, that the schedules are not binding as to prices. The Commission was directed to determine the "actual" avoided costs on July 6, 1983 for Snow Mountain.[26]

Upon remand to the Oregon PUC in 1988, the Commission immediately rejected any use of the 1983 rates.[27] Subsequently the Oregon PUC created new schedules for CPN for July 6, 1983 based on new methodology and a fact finding that CPN would remain an "all requirements" utility through the end of the power sale, obtaining all of its power at wholesale rates.[28]

The posted prices were not treated as tariffs by the Courts. The final Oregon PUC order contained the following legal justification for its new lower rates.

> "[CPN] did not present any estimates of its avoided costs for future years. CPN's position is that it cannot predict [its future costs for power] . . . (App. B11)
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> . . .

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[26] *Id.* B49. The Petitioner, unsuccessfully sought to modify the remand Order, pointing out to the Appellate Court and the Oregon Supreme Court that the price adjustment factors allowed by the federal law had been briefed in the UM-11 proceeding and had been taken into account in the contract language. App. B30 and B31.

[27] *Snow Mountain Pine Co. v. C.P. Nat'l Corp.*, 64 PUR 4th 166 (Or. P.U.C. Nov. 13, 1984) (No. UM 11, 84-895). App. B25-B27.

[28] *Snow Mountain Pine Co. v. C.P. National Corporation*, 100 PUR 4th 190 (Or. P.U.C., Dec. 5, 1988) (No. UM 11, 88-1419). App. B15-B21, B1 and B2.

> The Public Utility Regulatory Policies Act (PURPA) § 210 . . . precludes the Federal Energy Regulatory Commission (FERC) from requiring a rate in excess of full "avoided costs" . . . [citing also] 18 CFR 292.304(a)(2) (App. B13)
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> . . . A utility's avoided costs may change from the estimate in the filed avoided cost schedule . . . " (App. B13) "avoided costs . . . belong in the realm of uncertainty." (App. B17).

The ineluctable result of this litigation and affirming decisions[29] is deprivation by state action of the rights which Snow Mountain had on the date of its offer. Concepts of due process were offended by retroactive ratemaking and the introduction by the state of new hurdles for Snow Mountain to overcome throughout the litigation process.

Snow Mountain has filed over 20 briefs of federal law in this litigation against the Oregon PUC and CPN. Nonetheless, federal law has been interpreted to allow and even compel the results described.

ARGUMENT FOR ISSUANCE OF WRIT OF CERTIORARI

I.

THE FERC PROGRAM IS RENDERED IMPOTENT AS A REMEDIAL PROGRAM

Oregon's Courts have decided federal law in a manner which conflicts with other federal and state courts of

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[29] *Snow Mountain Pine Company v. C.P. National Corp.*, 102 Or. App. 687, 795 P.2d 611 (Or. App. August 1, 1990) (per curiam), review denied, 310 Or. 612, 801 P.2d 840 (November 20, 1990).

last resort. *Snow Mountain* presents as proper, a PURPA enforcement scheme which inquired of the cogenerator's costs, required extensive administrative hearings as a condition to PURPA benefits and changed the rules of the game in mid-stream. The delay and unlawful conduct of the utility benefited the utility. The cogenerator was deprived of his price entitlement through retroactive computation of avoided costs.

Petitioner is of the view that the price entitlement is a federal property right which the state took improperly. This would seem to be the view of the FERC commentary which explained that the use of the term "actual avoided cost" had been removed from the proposed regulations so as to avoid retroactive ratemaking.[30]

II.

AN IRRECONCILABLE CONFLICT IS CREATED BY THE SNOW MOUNTAIN DECISION. FEDERAL LAW HAS BEEN HELD TO REQUIRE SETTING ASIDE PAST AVOIDED COSTS WHICH ARE HIGHER THAN FULL AVOIDED COSTS AND ALSO HAS BEEN INTERPRETED TO PROHIBIT RETROACTIVE ADJUSTMENT TO AVOIDED COSTS.

In 1988, the Pennsylvania Public Utility Commission issued a ruling in connection with the desire of a Pennsylvania utility to insert in all PURPA contracts a clause which allows the Commission to retroactively set-aside avoided cost rates in certain circumstance. Pennsylvania's Public Utility Commission took the view at that time that such provisions were preempted by federal law for the

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[30] 45 Fed. Reg. 12,224 (1980). (App. A28).

reasons presented hereinabove by Petitioner.[31] This view of federal law is in the decided minority among the states, if it exists at all.

In four different cases stemming from conduct by Idaho Power Company identical to that of CPN, Idaho's highest court has been forced to consider if fixed rates are a federal entitlement. *Afton Energy Inc., v. Idaho Power Company, Inc.*, 107 Idaho 781, 792, 693 P.2d 427, 438 (1984) held that federal law empowers the Idaho PUC to force a utility to sign a contract. However, there was dissent, arquing that the state PUC could not do so in conformity with ratepayer protection if contract rates are fixed. In the three *Afton* cases which have followed, the Supreme Court of Idaho ruled that authority is vested in the Commission by state law to change all rates to protect ratepayers:

> "As our opinions in Afton III and IV pointed out and the majority hold today, under the law of . . . Idaho, the rates contained . . . may be adjusted . . . at any time . . . if . . . fair, just and reasonable. . . . However, . . . we recognize that in the event the authority granted . . . by Idaho law is "inconsistent with federal law" ie., it is prohibited and thus preempted. . . . Federal law would be controlling. . . . Preemption . . . is a question of federal law." (761 P.2d 1211).

Justice Robert Huntley, filed a special concurrence, in which he, as an author of the prior opinion, wrote that

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[31] Petition of Pennsylvania Electric Company for Rate Recovery, No. P-870248 (Pennsylvania Public Utility Commission January 21, 1988), citing federal law. See footnote 21 at pp. 7-8, *Supra*.

Idaho had ruled that the fixed rates in PURPA contracts could not be altered:

> " . . . the issue was hotly contested. . . . We held that federal law preempted and controlled." (761 P.2d. 1212).

The Idaho Supreme Court has agreed that the question of whether PURPA preempts such Commission action must be addressed by this federal court, see, *Afton Energy Inc. v. Idaho Power Co.*, 114 Idaho 852, 761 P.2d to 1204, 1212 (1988); *Afton Energy Inc. v. Idaho Power Co.*, 111 Idaho 925, 930, 729 P.2d 400, 405; and *Idaho Power Company v. Idaho Public Utilities Commission*, 107 Idaho 1122, 695 P.2d 1261 (1985).

The *Snow Mountain* case now presents the various Commissions with Hobson's choice. On the one hand, federal law is said in *Snow Mountain* to preempt the payment of prices which are 'deemed' to be above full avoided costs. In *Snow Mountain*, this logic **compelled** setting aside approved tariffs and the federal entitlement to certainty and locked-in tariffs. The *Afton* cases recognize the power of state commissions to lower avoided cost rates, even retroactively, to protect ratepayers. On the other hand, the fixed price entitlement of the program appears to bar such changes.

Clearly, the states have run into the political problem created by placing PURPA enforcement into the hands of Commissions which are chartered to protect ratepayers against rate increases.[32]

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[32] The record in *Snow Mountain* indicated that the Commissioner before whom the Complaint was filed resigned to take employ with CPN with responsibility to protect the utility

(Continued on following page)

Justices of the United States Supreme Court have noted the split of authority on the question of whether a state could set prices above the FERC mandated "full avoided cost" level. No review of this issue had been deemed of sufficient import, when the issue was only whether states could do **more** to assist PURPA by adopting higher avoided cost rates.[33] However, the *Snow Mountain* cases presents the use of that "full avoided cost" limitation as a lever to undo any PURPA contract and price entitlement, previously locked-in. *A fortiorari*, if such is the law in a state such as Oregon, which legislatively allowed rates above full avoided costs, and, in a situation where the rates in issue were adopted as being the true avoided costs and not above actual avoided costs,[34] cogenerators face the prospect of losing their contracts in all jurisdictions if this case is not overturned. Understanding that avoided costs are always guesses based on long term assumptions about electric demand

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(Continued from previous page)

against the attempted power sale. [SM Ex. R-31]. A subsequent commissioner's position was to inform CPN that any PURPA payments to Snow Mountain would not be recovered from ratepayers. [SM Ex. R-6].

[33] *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, 483 N.Y.S. 2d 153, 472 N.E. 2d 981 (1984), cert. denied; 470 U.S. 1075, 1055 S.Ct. 1831 (1984); *Kansas City Power & Light Co. v. State Corporation Commission*, 676 P.2d 764 (Kan.Feb.18, (1984)), appeal dismissed 479 U.S. 801, 107 S.Ct. 41 (1986). The contest of that question was dismissed as premature in *Occidental Chemical Corporation v. F.E.R.C.*, 869 F.2d 127 (2d Cir., Feb. 22, 1989) because the FERC decision involved was stayed.

[34] The Oregon legislature was made aware of this pricing policy as the best estimate of real avoided costs. See, App. A77.

and economic growth on the one hand, and construction costs and interest rates on the other hand, *Snow Mountain* gives states a free hand to un-tie PURPA transactions. States may freely call their prior estimates "too high" and invoke an allegedly preemptive "full avoided cost" limit to divest cogenerators of the entitlement to fixed prices.[35] The paradox presented is that those fixed prices are also vested by federal law.

III.

THE PURPA PROGRAM DOES NOT WORK AUTOMATICALLY IN THE MANNER OF OTHER FEDERAL ENTITLEMENT PROGRAMS, AS WAS ENVISIONED. IT HAS BECOME A PROGRAM AVAILABLE ONLY TO THOSE WILLING TO RISK LOSS OF EXPECTED BENEFITS.

PURPA was a **remedial** program. FERC created a self executing program based upon the acceptance by cogenerators of an "offer to purchase power" mandated by PURPA. FERC mandated that prices be based upon long term pricing data filed by utilities with state commissions and approved by Commissions as being fair and reasonable and non-discriminatory to cogenerators. It would seem that the posted price was a material part of

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[35] The matter of setting prices is not an exact science. Any avoided cost estimate may be changed. In a contemporary proceeding by CPN before the Oregon PUC, the prior Commissioner testified that he believed the marginal pricing policy used for CPN was proper, that the avoided costs so set were lawful and that he would do the same again. The counsel for CPN in this proceeding and the counsel for the Commission admitted in that proceeding stated that the 1982 rates of Idaho Power (higher than the 1983 rates) might over time prove to be the best guess of actual avoided cost for CPN. [SM Ex. R-23, R-84, pp. 134 and 341, and R-13, p. 10].

the mandated offer. FERC stated that it did not contemplate any minute by minute recalculations of posted avoided costs, but that over time, over-payments and under-payments would even out.[36] Few aspects of the arrangement were left open to negotiations or delay. In this way, a vast untapped pool of energy supply was to be encouraged and developed. It was expected that project financiers would make loans, knowing that the promised stream of payments was assured by law.

But this simple vision has not been the common vision or experience, as illustrated by the extensive litigation of PURPA matters. That such cases are still being hard fought is sufficient testimony to the need for the United States Supreme Court to address the issues presented herein.

In 1984, the Idaho Public Utility Commission observed:

> Again and again, . . . Idaho Power . . . waits a few months, complains that the rates set in these orders are wrong and collaterally attacks them when the sole adversary has [not] the resources . . . to defend the Commission Orders. . . . Cogeneration rates, as we have repeatedly stated, are like Idaho Power's own retail rates: they are in effect until revised by Commission Order. . . . "[37]

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[36] 45 Fed. Reg. 12,224 (1980). App. A26, A27.

[37] *In the matter of the application of Idaho Power Company for an order approving the signing by Idaho Power Company of a firm energy agreement,* case U-1006-234 (Idaho Public Utilities Commission, (May 23, 1984).

Idaho's Public Utility Commission observed in, *Empire Lumber Company v. Washington Water Power Company,* Case No. U-1008-241 (March 1986) (Order 20693) in September of 1986:

> For Water Power to continue to assert . . . that it is not bound to the avoided costs published in the tariff schedule . . . is indefensible.[38]

It is not unusual to have to litigate in order to avail oneself of the PURPA program. PURPA did not end utility recalcitrance or delay.

This case presents the issue squarely before this court at a time when the published tariffs, more than ever, need to be reliable. The lending community will want to know if it can rely upon locked-in prices to support loans. It will want to know if past project financing can be put in jeopardy. Raymond Feichtmeir wants to know that his dogged efforts to enforce his rights under federal law, as they existed on July 6, 1983, are not without forum and the wrongs visited upon him are not without any federal remedy.

THE RAISING AND DISPOSITION OF FEDERAL QUESTIONS BELOW

This Court has jurisdiction over this case. Petitioner raised these issues below. The decisions below were based upon federal law and implementing regulations.

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[38] *Empire Lumber v. Washington Water Power,* 114 Idaho 191, 755 P.2d 1229 (1988), cert. denied, 448 U.S. 892, 109 S.Ct. 228 (1988).

OPUC Order 84-263 (April 6, 1984) states:

"Section 210 of PURPA [cite] requires electric utilities to purchase. . . . Section 210 PURPA required the Federal Energy Regulatory Commission (FERC) to promulgate rules and requires the Commissioner to implement the . . . rules . . . for utilities in Oregon. These rules appear as Part 292 of FERC rules [cite]. Oregon law requires the Commissioner to administer Oregon law . . . The Commissioner promulgated rules to implement these provisions [cite]. . . . CPN argues that it should be excused because CPN would [incur additional costs which] cause rates to increase. These are all factors that can be considered in calculating the cost to CPN of taking from Snow Mountain. . . . "[39]

OPUC Order 84-895 (Nov. 14, 1985) states:

PURPA and the Commissioner's Rules require the utility to pay its avoided cost. . . . The Commissioner directed CPN to pay its supplying utility's avoided costs . . . The filing was to be in effect until CPN filed its own costs based on long term considerations. CPN has used this proceeding to file long term avoided costs on the notion that CPN plans to serve future loads with purchased power. . . . The Commissioner concludes that the September 1984 avoided costs filed by CPN are true and accurate avoided costs of CPN. . . . These rates are now filed and approved . . . The record indicates that Snow Mountain . . . opted for payment to it of 'projected avoided costs calculated at the time the legal obligation to purchase the energy . . . is incurred.' The Commissioner concludes that the legal obligation to purchase the power occurs at

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[39] App. B71.

> the time of publication of this dispositive order. . . . "[40]

In the Memorandum In Support of Motion For Stay Of Order Nos. 84-895, 85-024 and 85-037, Snow Mountain again argued from federal law:

> "Snow Mountain had a vested right to rely on the Commissioner's existing policies enforcing existing federal and Oregon laws without the Commissioner changing his policies on such matters as . . . the manner of determining avoided costs rates."[41]

Petitioner's Second Amended Complaint For Review of Order NOS. 84-895, 85-024 and 85-037 OF THE OREGON PUBLIC UTILITY COMMISSIONER (Case A8501-00567, Circuit Court Of Oregon For County of Multnomah) stated:

> "Snow Mountain filed a Complaint with the Commissioner in October, 1983 requesting enforcement of federal and Oregon law." (page 12). . . .
>
> The actions by CPN . . . are expressly prohibited by federal law and are a reflection of improper state enforcement of federal law and a failure to encourage cogeneration as required by federal law." (page 17) . . .

On Appeal to the Oregon Court of Appeals, all of the parties argued PURPA cases. The resultant decision in *Snow Mountain v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366 (1987) *review denied*, 303 Or. 591, 739 P.2d 571 (1987) states *inter alia*:

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[40] App. B65.

[41] At p. 19.

> Cogeneration facilities simultaneously produce two useful forms of energy . . . They use significantly less fuel . . . See 45 Fed Reg 12,215 (1980). To encourage the conservation of oil and gas by electric utilities Congress enacted section 210 of . . . PURPA. [citation to *FERC v. Mississippi*, 456 US 742,750]. . . . State regulatory authorities are required to implement FERC's regulations . . . Oregon has enacted legislation that closely parallels federal statute . . . and [has] rules which, with a few exceptions, are substantially the same as federal regulations. (at 591).
>
> . . . The date on which the [seller] obligates itself to deliver energy fixes the date on which "avoided costs" are determined.
>
> . . . To permit a utility to delay the date to be used . . . would expose [sellers] to risks we believe Congress . . . intended to prevent . . .
>
> . . . The FERC Commentary . . . suggests that a utility cannot 'merely by refusing to enter into a contract' deprive a qualifying facility of its right to commit to sell power in the future at prices which are determined at the time the qualifying facility makes its decision to sell power . . . 45 Fed Reg 12,224 (1980)

However, that Court then remanded the case to retroactively "determine" the prices on July 6, 1983. Finally, Order 88-1419 which lowered the rates posted during July 6, 1983, relied on federal law:

> The Public Utility Regulatory Policies Act (PURPA) § 210 . . . precludes the Federal Energy Regulatory Commission (FERC) from requiring a rate in excess of full "avoided costs" . . . [citing also] 18 CFR 292.304(a)(2)

The courts which affirmed this process and this result relied upon federal law. There should be no question of

jurisdiction. PURPA requires direct appeal to this Court. App. A7-A9.

ARGUMENT AMPLIFYING THE REASONS FOR ISSUANCE OF WRIT

The interpretation of the federal program given by the Oregon courts in the *Snow Mountain* cases removes posted prices as a reliable inducement to cogeneration and financing. Without clarification of the law, there is no predictable and assured price which may be locked-in, and there is the real possibility that Commissioners of the states will be asked to lower the avoided costs in existing contracts. There is the prospect that there is no bankable PURPA contract existing. Even were posted prices an inducement, this case allows prospective cogenerators to be subjected to years of intrusive inquiry and litigation by a state enforcement agency. The prospect of fighting the state and batteries of ratepayer supported utility lawyers and facing ever changing arguments through years of litigation is no small dis-encouragement to a businessman involved in a non-utility business. Proponents of PURPA hope for this Court to make PURPA a program which requires speedy, inexpensive and non-intrusive enforcement, and which is based upon a fixed entitlement to predictable (if not exact) prices, approved and posted for election by prospective cogenerators without fear of retroactive ratemaking. Otherwise, the mere **ability** of state regulatory commissions to reenact the Snow Mountain history for others will have a "veto" effect over this aspect of the federal energy program.

CONCLUSION

Snow Mountain Petitions For A Writ of Certiorari because its reading of the law, as it existed then, and now, assured it of vested benefits which have been removed by state action without due process or compensation. The Snow Moutain case, recommends itself for certiorari also because of the open opposition of the utility and the state to PURPA in this case. Bad law was made by the state and by CPN in their successful efforts.

Respectfully submitted,

PAUL E. LEVY
Counsel for Petitioner

February 19, 1991

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APPENDIX A

U.S. Const., Article VI

[cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S Const., amend. XIV

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 16 – CONSERVATION

§ 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to –

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility

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[1] So in original. Probably should be followed by a comma.

to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase –

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale –

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental costs of alternative electric energy" means, with respect

to electric energy purchases from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later, than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together

with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from –

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section.

(B) the provisions of sections 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under

subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of any electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirement of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than –

> (i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section[2] or
>
> (ii) an action under paragraph (1).

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[2] So in original. Probably should be followed by a comma.

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric facility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district, court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", primary

energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 2(17) and (18) of the Federal Power Act [16 U.S.C. 796(17),(18)].

Section 796 Definitions

(17)(A) "small power production facility" means a facility which –

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other faciiities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy –

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent –

(I) unanticipated equipment outages, and

(II) emergencies directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility –

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale or electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces –

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which –

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

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18 C.F.R. § 292.301 *Scope.*

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

§ 292.302 *Availability of electric utility system cost data.*

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion

kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until June 30, 1982.

(b) *General rule.* To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the

associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) *Special rule for small electric utilities.* (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide that data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) *Substitution of alternative method.* (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) *State Review.* (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

§ 292.303 *Electric utility obligation under this subpart.*

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this

subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

§ 292.304 *Rates for purchases.*

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this

subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying

facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies,

including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variation in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.* (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

18 C.F.R. § 292.305 *Rates for sales.*

(a) *General rules.* (1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

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18 C.F.R. § 292.401 *Implementation by State regulatory authorities and nonregulated electric utilities.*

(a) *State regulatory authorities.* Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(b) *Nonregulated electric utilities.* Not later than one year after these rules take effect, each nonregulated electric utility shall, after notice of an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to comply with Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

(c) *Reporting requirement.* Not later than one year after these rules take effect, each State regulatory authority and nonregulated electric utility shall file with the Commission a report describing the manner in which it will implement Subpart C (other than § 292.302 thereof).

18 C.F.R. § 292.402 *Implementation of certain reporting requirements.*

Any electric utility which fails to comply with the requirements of § 292.302(b) shall be subject to the same

penalties to which it may be subjected for failure to comply with the requirements of the Commission's regulation issued under section 133 of PURPA.

18 C.F.R. § 292.403 *Waivers.*

(a) *State regulatory authority and nonregulated electric utility waivers.* Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may, after public notice in the area served by the electric utility, apply for a waiver from the application of any of the requirements of Subpart C (other than § 292.302 thereof).

(b) *Commission action.* The Commission will grant such a waiver only if an applicant under paragraph (a) of this section demonstrates that compliance with any of the requirements of Subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.

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45 FED. REG. 12214 (1980)

SUMMARY: The Federal Energy Regulatory Commission hereby adopts regulations that implement section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The rules require electric utilities to purchase electric power from and sell electric power to qualifying cogeneration and small power production facilities, and provide for the exemption of qualifying facilities from certain federal and State regulation implementation of

these rules is reserved to State regulatory authorities and nonregulated electric utilities.

EFFECTIVE DATE: March 20, 1980.

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45 FED. REG. 12218 (1980)

§ 292.302 Availability of electric utility system cost data.

As the Commission observed in the Notice of Proposed Rulemaking, in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output. Under § 292.304 of these rules, the rate at which a utility must purchase that output is based on the utility's avoided costs, taking into account the factors set forth in paragraph (e) of that section. Section 292.302 of these rules is intended by the Commission to assist those needing data from which avoided costs can be derived. It requires electric utilities to make available to cogenerators and small power producers data concerning the present and anticipated future costs of energy and capacity on the utility's system.

* * *

The Commission has also revised this section so that the rates for purchases can be more readily calculated from the data produced. The Commission has changed

paragraph (b)(3) to provide that a utility shall submit the associated energy cost of each planned unit expressed in kilowatt-hours (kWh) along with the estimated capacity cost of planned capacity additions. This change is intended to ensure that the calculation of avoided costs includes the lower energy costs that might be associated with the new capacity. The Commission points out that the determination of a rate for purchases from a qualifying facility which enables a utility to defer or avoid the addition of a new unit must also reflect the hours of expected use of the deferred or avoided capacity addition.

* * *

Paragraph (b) provides that each regulated electric utility meeting the requirements of paragraph (a) must furnish to its State regulatory authority, and maintain for public inspection, data related to the costs of energy and capacity on the electric utility's system. Each nonregulated electric utility also must maintain such data for public inspection.

* * *

An electric utility which is legally obligated to obtain all of its requirements for electric energy and capacity from another utility may provide the data provided by its supplying utility and the rates at which it currently purchases such energy and capacity for any period during which this obligation will continue. The wholesale rates may require adjustment in order to reflect properly the avoided costs. This is discussed later in this preamble under § 292.303. In the case of small, non-generating

utilities, the requirements of this section will be considered to have been satisfied if these cost data are readily available from the supplying utility.

Numerous comments mentioned that the proposed rule did not address the issue of validation of the data to be provided pursuant to this section. As a result, the Commission has added paragraph (e) which provides that any data submitted by an electric utility under this section shall be subject to review by its State regulatory authority Paragraph (e)(2) places the burden of providing support for the data on the utility supplying the data.

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45 FED. REG. 12224 (1980)

§§ 292.304(b)(5) and (d) Legally enforceable obligations.

Paragraphs (b)(5) and (d) are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs. Some of the comments received regarding this section stated that, if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe that the reference in the

statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.

Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that, in the long run, "overestimations" and "underestimations" of avoided costs will balance out.

Paragraph (b)(5) addresses the situation in which a qualifying facility has entered into a contract with an electric utility, or where the qualifying facility has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility. The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility. This subparagraph will thus ensure the certainty of rates for purchases from a qualifying facility which enters into a commitment to deliver energy or capacity to a utility.

Paragraph (d)(1) provides that a qualifying facility may provide energy or capacity on an "as available" basis, i.e., without legal obligation. The proposed rule provided that rates for such purchases should be based on "actual" avoided costs. Many comments noted that basing rates for purchases in such cases on the utility's "actual avoided costs" is misleading and could require retroactive ratemaking. In light of these comments, the Commission has revised the rule to provide that the rates for purchases are to be based on the purchasing utility's avoided costs estimated at the time of delivery.

Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.

Many commenters noted the same problems for establishing rates for purchases under subparagraph (2) as in subparagraph (1). The Commission intends that rates for purchases be based, at the option of the qualifying facility, on either the avoided costs at the time of delivery or the avoided costs calculated at the time the obligation is incurred. This change enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation or to receive the avoided costs determined at the time of delivery.

A facility which enters into a long term contract to provide energy or capacity to a utility may wish to

receive a greater percentage of the total purchase price during the beginning of the obligation. For example, a level payment schedule from the utility to the qualifying facility may be used to match more closely the schedule of debt service of the facility. So long as the total payment over the duration of the contract term does not exceed the estimated avoided costs, nothing in these rules would prohibit a State regulatory authority or non-regulated electric utility from approving such an arrangement.

OREGON ADMINISTRATIVE RULES 860-29-001, *et seq.*

ELECTRIC UTILITIES INTERCONNECTION WITH ELECTRIC COGENERATION AND SMALL POWER PRODUCTION FACILITIES

Purpose

860-29-001 The purpose of this Division is to implement ORS 758.500 to 758.530 and to implement regulations relating to electric utilities and qualifying cogeneration and small power production facilities as provided under Section 210 of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Public Law 95-617 (16 USC 824a-3).

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the office of the Public Utility Commissioner.]

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755)

Applicability of Rules

860-29-005 (1) These rules shall apply to all interconnection arrangements between a public utility as defined by ORS 758.500 and facilities which are qualifying facilities as defined herein. Provisions of these rules shall not supersede contracts existing prior to the effective date of this rule. At the expiration of such an existing contract between an electric utility and a cogenerator or small power producer, any contract extension or new contract shall comply with these rules.

(2) Nothing in these rules limits the authority of an electric utility or a qualifying facility to agree to a rate for any purchase, or terms of conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be provided by these rules, provided such rates or terms do not burden ratepayers of the utility.

(3) In the event of an impasse in negotiations between an electric utility and a qualifying facility, either party may request a determination by the Commissioner of the matter at issue.

Stat. Auth.: ORS Ch 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Definitions

860-29-010 (1) "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying

facility or qualifying facilities, the utility would generate itself or purchase from another source and shall include any costs of interconnection of such resource to the system.

(2) "Back-up power" or "stand-by power" means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the facility.

(3) "Base rate" means that rate for capacity, firm energy and non-firm energy established by the Commissioner under ORS 758.530(2).

(4) "Capacity" means the average output in kilowatts (kW) committed by a qualifying facility to a utility during any 24-hour period.

(5) "Capacity costs" means the costs associated with supplying capacity; they are an allocated component of the fixed costs associated with providing the capability to deliver energy.

(6) "Cogeneration" means the sequential generation of electric energy and useful heat from the same primary energy source or fuel for industrial, commercial, heating or cooling purposes.

(7) "Cogeneration facility" means a facility which produces electric energy, and steam or other forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes, by cogeneration. An electric utility is not a cogeneration facility for the purposes of this Division.

(8) "Commissioner" means the Oregon Public Utility Commissioner.

(9) "Costs of interconnection" means the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for system protection, safety provisions and administrative costs incurred by an electric utility directly related to the installation and maintenance of the physical facilities necessary to permit purchases from a qualifying facility.

(10) "Demand" means the average rate in kilowatts at which electric energy is delivered during a set period of time, to be determined by mutual agreement between the utility and the customer.

(11) "Electric utility" means any person as defined by ORS 758.500 engaged in the generation, distribution, sale, purchase, transmission, or furnishing of electricity.

(12) "Energy" means electric energy, measured in kilowatt hours (kWh).

(13) "Energy costs" means:

(a) For non-firm energy, the incremental costs associated with the production or purchase of electric energy by the utility, which costs included the cost of fuel and variable operation and maintenance expenses, or the cost of purchased energy; and

(b) For firm energy, the combined allocated fixed costs and associated variable costs applicable to a displaced generating unit or to a purchase.

(14) "Firm Energy" means a specified quantity of energy committed by a qualifying facility to a utility during each calendar quarter or lesser defined period.

(15) "Interruptible power" means electric energy or capacity supplied by an electric utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.

(16) "Non-firm Energy" means:

(a) Energy to be delivered by a qualifying facility to utility on an "as available" basis;

(b) A specified quantity of energy committed to be delivered by a qualifying facility to a utility over a period exceeding one calendar quarter in length;

(c) Energy delivered by a qualifying facility in excess of its firm energy commitment.

NOTE: The rate for non-firm energy may contain an element representing the value of aggregate capacity of non-firm sources.

(17) "Maintenance power" means electric energy or capacity supplied by an electric utility during scheduled outages of a qualifying facility.

(18) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The terms does not include minimum amounts of fuel required for ignition, start-up testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.

(19) "Purchase" means the purchase of electric energy capacity or both from a qualifying facility by an electric utility.

(20) "Qualifying facility" means a cogeneration facility; a small power production facility as defined by these rules.

(21) "Rate" means any price, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity; any rule, regulation, or practice respecting any such rate, charge, or classification.

(22) "Sale" means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(23) "Small power production facility" means a facility which produces electric energy using as a primary energy source biomass, waste, solar energy, wind power, water power, geothermal energy, or any combination thereof. Only small power production facilities which, together with any other facilities located at the same site, have power production capacities of 80 megawatts or less, are covered by these rules. An electric utility is not a small power production facility for the purposes of this Division.

(24) "Supplementary power" means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(25) "System emergency" means a condition on an electric utility's system which is likely to result in imminent, significant disruption of service to customers, in imminent danger to life or property, or both.

(26) "Time of Delivery" means:

(a) In the case of capacity, when the generation if first on line and capable of meeting the capacity commitment of the qualifying facility to the utility under the terms of its contract or other legally enforceable obligation;

(b) In the case of firm energy and depending upon the contract between the parties, either:

(A) When the first kilowatt-hour of energy is able to be delivered under the commitment of the qualifying facility; or

(B) When each kilowatt-hour is delivered under the commitment of the qualifying facility.

(27) "Time the Obligation is Incurred" means the date on which a binding obligation first exists between a qualifying facility and a utility to deliver capacity or firm energy.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Obligations of Qualifying Facilities to the Electric Utility

860-29-020 The conditions listed in this section shall apply to all qualifying facilities to be served by an electric utility under this Division:

(1) The owner or operator of a qualifying facility purchasing or selling electricity pursuant to these rules shall execute a written agreement with the electric utility. The electric utility shall file a true copy or summary of the terms of the executed agreement with the Commissioner within 30 days of the execution of the agreement. If a summary is filed, the summary shall identify the quantity and quality of the power and the price being paid. A true copy of the executed contract shall be available upon request for Commissioner staff review.

(2) In order to ensure system safety and reliability of interconnected operations, all interconnected qualifying facilities shall be constructed and operated in accordance with all applicable federal, state, and local laws and regulations.

(3) The qualifying facility shall furnish, install, operate, and maintain in good order and repair and without cost to the electric utility switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus as shown by the utility to be reasonably necessary for the operation of the qualifying facility in parallel with the electric utility's system, or may contract for the electric utility to do so at the expense of the qualifying facility. Delivery shall be at a voltage, phase, power factor, and frequency as specified by the utility.

(4) Switching equipment capable of isolating the qualifying facility from the electric utility's system shall be accessible to the utility at all times.

(5) At its option, the electric utility may choose to operate the switching equipment, described in section (4) of this rule if, in the sole opinion of the utility, continued operation of the qualifying facility in connection with the utility's system may create or contribute to a system emergency. Such a decision by the utility is subject to the Commissioner's verification pursuant to OAR 860-29-070. The utility shall endeavor to minimize any adverse effects on the qualifying facility of the operation of the switching equipment.

(6) Any agreement between a qualifying facility and an electric utility shall provide for the degree to which the qualifying facility will assume responsibility for the safe operation of the interconnection facilities.

(7) At its option, the electric utility may require a qualifying facility to report periodically the amount of deliveries and scheduled deliveries to the utility, as shown to be reasonably necessary for the utility's system operations and reporting.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Obligations of the Electric Utility to Qualifying Facilities

860-29-030 (1) Obligations to purchase from qualifying facilities: Each electric utility shall purchase, in accordance with OAR 860-29-040, any energy and capacity in excess of station service (power necessary to produce generation) and amounts attributable to conversion losses, which is made available from a qualifying facility:

(a) Directly from a qualifying facility in its service territory; or

(b) Indirectly from a qualifying facility in accordance with section (4) of this rule.

(2) Obligation to sell to qualifying facilities: Each electric utility shall sell to any qualifying facility, in accordance with OAR 860-29-050, any energy and capacity requested by the qualifying facility on the same basis as available to other customers of the utility in the same class who do not generate electricity.

(3) Obligation to interconnect: Each electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this Division. The obligation to pay for any interconnection costs shall be determined in accordance with OAR 860-29-060.

(4) Option to wheel power to other electric utilities: At the request of a qualifying facility, an electric utility (which would otherwise by obliged to purchase energy or capacity from such qualifying facility) may transmit (wheel) energy or capcity [sic] to any other electric utility, at the expense of the qualifying facility.

(5) Parallel operation: Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with the standards established in accordance with OAR 860-29-020.

(6) Where the generating portion of the qualifying facility consumes more electric energy than its produces, the utility shall cease purchases.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Rates for Purchases

860-29-040 (1) Rates for purchases by electric utilities shall:

(a) Be just and reasonable to the ratepayers of the electric utility and in the public interest; and

(b) Be in accordance with this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(2) Nothing in this Division authorizes an electric utility to pay more than its avoided costs for purchases unless expressly allowed by these rules or by the Commissioner.

(3) Establishing rates:

(a) Except for qualifying facilities in existence prior to November 1978, a rate for purchases satisfies the requirements of section (1) of this rule if the rate equals the avoided costs or base rate, whichever is higher, and

determined after consideration of the factors set forth in section (6) of this rule.

(b) When the rates for purchases are based upon estimates of avoided costs over a specific term of the contract or other legally enforceable obligation, the rates do not violate these rules if any payment under the obligation differs from avoided costs.

(c) Nothing in these rules shall be construed as requiring payment of avoided-cost prices to qualifying facilities in existence prior to November, 1978; provided, however, that prices for such purchases shall be sufficient to encourage continued power production.

(4) Rates for purchases – time of calculation. Except for the purchases made under section (5) of this rule, standard rates, each qualifying facility shall have the option to:

(a) Provide non-firm energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided non-firm energy avoided cost or base rate in effect when the energy is delivered; or

(b) Provide firm energy, and/or capacity pursuant to a legally enforceable obligation for the delivery of energy and/or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on:

(A) The avoided costs calculated at the time of delivery; or

(B) The avoided costs projected to apply over the life of the obligation as calculated at the time the obligation is incurred; or

(i) The base rate in effect at the time of initial delivery; or

(ii) The base rate in effect when the obligation is incurred.

(5) Standard rates for purchases shall be implemented as follows:

(a) Each electric utility shall publish standard rates for purchases from qualifying facilities with a nameplate capacity of one hundred kilowatts or less, in the same manner as it publishes rates for the sales of electricity. The publication shall contain all the terms and conditions of the purchase. The standard rate of the utility, or the base standard rate set by the Commissioner, whichever is higher, shall apply to purchases from qualifying facilities with a nameplate capacity of one hundred kilowatts or less.

(b) Except as provided in subsection (5)(c) of this rule, the standard rates for purchases under subsection (5)(a) of this rule:

(A) Shall be based upon the base standard rate or upon avoided cost and consistent with sections (1) and (6) of this rule whichever is higher; and

(B) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(c) Notwithstanding subsection (5)(b) of this rule, the utility shall file by August 1, 1982, standard rates using the base rate or the higher of the utility's last residential schedule rate block or the utility's last non-demanded metered general service schedule rate block, after application of the exchange contract provisions of section 7(b) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980. However, when data are developed in sufficient detail to base standard rates on avoided cost, but no later than June 30, 1983, the utility shall file standard rates based upon avoided cost, or base rate, whichever is higher.

(6) Factors affecting rates for purchases: In determining avoided costs and for determining base rate the following factors shall, to the extent practicable, be taken into account:

(a) The data provided pursuant to OAR 860-29-080(2) and the Commissioner's evaluation of the data;

(b) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the utility to dispatch output of the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(E) The usefulness of energy and/or capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(G) The smaller capacity increments and the shorter lead times available, if any, with additions of capacity from qualifying facilities.

(c) The relationship of the availability of energy and/or capacity from the qualifying facility as derived in subsection (6)(b) of this rule, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(d) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility if the purchasing electric utility generated an equivalent amount of energy itself of purchased an equivalent amount of energy and/or capacity.

(7) At the option of the qualifying facility, a contract between a utility and a qualifying facility may provide for levelized payments for firm energy delivered under paragraph (4)(b)(A) of this rule when time of delivery is as defined by OAR 860-29-010(26)(b)(A), or for capacity delivered. The levelized payments shall not commence

until deliveries begin under the contract. If a utility has reason to believe that it is not in the public interest to levelize payments associated with a particular project or that the risk of non-performance by the qualifying facility is substantial, the utility may apply to the Commissioner for relief from the obligation to levelize payments under the contract.

Stat. Auth.: ORS Ch. 756

Hist.: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Rates for Sales

860-29-050 (1) Rates for sales by electric utilities shall:

(a) Be just and reasonable and in the public interest; and

(b) Not discriminate against qualifying facilities.

(2) Rates for sales which are based on accurate data and consistent, system-wide costing principles shall be considered not to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

(3) The following additional services shall be provided by an electric utility to a qualifying facility at its request:

(a) Supplementary power;

(b) Back-up power;

(c) Maintenance power; and

(d) Interruptible power.

(4) The Commissioner may waive any requirement of section (3) of this rule if, after notice in the area served by the electric utility and after opportunity for public comment, the electric utility demonstrates and the Commissioner finds that compliance with such requirement will:

(a) Impair the electric utility's ability to render adequate service to its other customers; or

(b) Place an undue burden on the electric utility.

(5) The rate for sale of back-up power or maintenance power:

(a) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, during the system peak, or both; and

(b) Shall take into account the extent to which scheduled outages of the qualifying facilities can be coordinated usefully with the scheduled outages of the utility's facilities.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Interconnection Costs

860-29-060 (1) Obligation to pay: Any costs of interconnection shall be the responsibility of the owner or operator of the qualifying facility. Interconnection costs which may reasonably be incurred by the utility shall be assessed against a qualifying facility on a nondiscriminatory basis with respect to other customers with similar load or other cost-related characteristics.

(2) Reimbursement of interconnection costs: The electric utility shall be reimbursed by the qualifying facility for any reasonable interconnection costs including costs of financing at an interest rate no greater than the effective rate of the utility's last senior securities issuance at the time of the contract with the qualifying facility. If the utility does not have senior securities, then the interest rate shall be equal to the prevailing prime rate at an Oregon bank to be agreed upon at time of contract. Such reimbursement may be over any agreed period of time not greater than one-half the length of any contract between the utility and the qualifying facility where the contract is for a period greater than two years, otherwise reimbursement shall be made over a one-year period. At the option of the utility and with approval of the Commissioner, a utility may guarantee a loan to a qualifying facility for interconnection costs rather than finance such costs from the utility's own funds.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

System Emergencies

860-29-070 (1) Qualifying facility's obligation to provide power during system emergencies: A qualifying facility shall be required to provide energy and capacity to an electric utility during a system emergency only to the extent:

(a) Provided by agreement between such qualifying facility and electric utility; or

(b) Ordered under section 202(c) of the Federal Power Act.

(2) During any system emergency, an electric utility may curtail:

(a) Purchases from a qualifying facility if such purchases would contribute to such emergency (including net output requirement); and

(b) Sales to a qualifying facility, as qualified by section (3) of this rule, provided that such curtailment is on a nondiscriminatory basis.

(3) Except in cases of practical impossibility, sales to a qualifying facility which is generating 50 percent or more of its load, shall not be curtailed during a system emergency, or under mandatory curtailments established by Order No. 78-823, until all other customers in its class have been fully curtailed.

(4) A qualifying facility which is unable to deliver power to a utility owing to curtailment by the utility shall be relieved of any obligation to sell to the utility during the curtailment period.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

Electric Utility System Cost Data

860-29-080 (1) Each electric utility shall provide sufficient data concerning its avoided costs and costs of interconnection to allow the owner or operator of a qualifying facility to estimate, with reasonable accuracy, the payment it could receive from the utility if the qualifying facility went into operation under any of the purchase agreements provided for in these rules.

(2) Each electric utility shall file with the Commissioner annually for capacity and quarterly for energy, beginning January 1, 1982, and each June 30 thereafter for review, and shall maintain for public inspection, the following data for use in calculating avoided costs, including data in suitable form to be used in Tables 1 to 3 of OAR 860-29-090:

(a) The estimated avoided cost on its system, solely with respect to the energy component, for expected levels of purchases from qualifying facilities. The levels of purchases shall be stated in blocks of not more than one hundred megawatts for systems with peak demand of one thousand megawatts or more and in blocks equivalent to not more than ten percent of the system peak demand for systems of less than one thousand megawatts. The avoided costs shall be stated on a cents-per-kWh basis, during peak and off-peak periods, by year, for the current calendar year and each of the next five years;

(b) Its plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding fifteen years; and

(c) Its estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kW, and the associated energy costs of each addition or purchase, expressed in cents per kWh. These costs shall be expressed in terms of individual generating resources and of individual, planned firm purchases.

(3) Nothing in these rules shall preclude the determination of avoided costs:

(a) As the average avoided costs, over an appropriate period of time; or

(b) To reflect variations in avoided costs because of changes in streamflows, generating unit availability, loads, seasons, or other conditions.

(4) State review: Any data submitted by an electric utility under this section shall be subject to review by the Commissioner. In any such review, the electric utility has the burden of supporting and justifying its data. Any standard rates filed under OAR 860-29-040 shall be subject to suspension and modification by the Commissioner.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No. 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No 82-514)

Avoided Cost Estimation Tables

860-29-090 The Tables 1 through 3 are for the purpose of enabling qualifying facilities to determine the approximate revenues which might be received from sales made to utilities. The data to be provided by utilities for use with the tables are subject to verification by the Commissioner.

Stat. Auth.: ORS Ch. 756

Hist: PUC 9-1981, f. & ef. 10-29-81 (Order No 81-755); PUC 7-1982, f. & ef. 7-21-82 (Order No. 82-514)

TABLE 1

(860-29-090) Annual Non-Firm Energy Payment Estimate

(for generation with a design capacity in excess of 100 kW)

Item	QUARTER I		QUARTER II		QUARTER III		QUARTER IV		SOURCE
	On-Peak	Off-Peak	On-Peak	Off-Peak	On-Peak	Off-Peak	On-Peak	Off-Peak	
Short-term avoided energy costs-mills/kwh	___ (a)	___ (c)	___ (a)	___ (c)	___ (a)	___ (c)	___ (a)	___ (c)	Data from affected utility on file with PUC
Energy provided by qualifying facility	___ (b)	___ (d)	___ (b)	___ (d)	___ (b)	___ (d)	___ (b)	___ (d)	Qualifying facility
Estimated payment for each quarter		___ (e)		___ (e)		___ (e)		___ (e)	

(e) = (a) times (b) plus (c) times (d)

TABLE 2
(860-29-090)
Capacity Payment Estimate
(for generation with design capacity in excess of 100 KW)

Part I. Load-Following Adjustment

Item	Quarter	Source
Capacity Weighting Factor:	(1) ___ ___ ___ ___	From data of affected utility on file with PUC
Capacity to be provided on-peak (0600 to 2200 hours)	(2) ___ ___ ___ ___	Qualifying facility
Peak capacity factor (% of peak hour operation of QF)	(3) ___ ___ ___ ___	Qualifying facility
Weight times capacity provided	(4) ___ ___ ___ ___	(4) = (1) times (2) times (3)

Average capacity (5) = Sum of quarterly values in item (4) _____

*Loss of load probability factors or other weighting factors must total to one for year.

Part II. Length of Contract Adjustment (Dollars/kw)

Year of contract	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Value of displaced capacity* (6)	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—

*From data of affected utility on file with PUC – expressed in dollars per kw.

Part III. Determination of Capacity Payment

Average capacity (7) __ from Part I, Item (5)

Value of displaced capacity (8) __ determined from contract length, Part II

Estimate of annual payment (9) __ (9) = (8) times (7)

Note: If payments are to be made quarterly, subtract 10 percent each quarter for a performance reserve, as in Table 3 for energy. If QF performs in accordance with contract requirements, it would be entitled to a return of the reserve, plus interest, as described in Table 3.

TABLE 3

(860-29-090) Firm Energy Payment Estimate

(for generation with a design capacity is excess of 100 kw)

Item		QUARTER I		QUARTER II		QUARTER III		QUARTER IV		SOURCE
		On-Peak	Off-Peak	On-Peak	Off-Peak	On-Peak	Off-Peak	On-Peak	Off-Peak	
Contract commitment of qualifying facility (kwh)	(1)	___	___	___	___	___	___	___	___	Of Contract
Avoided cost	(2)	___	___	___	___	___	___	___	___	Date of affected utility on file with PUC
Sub-Total	(3)	___	___	___	___	___	___	___	___	(3)=(1) times (2)
Less Reserve	(4)	___	___	___	___	___	___	___	___	(4)=10% of (3)
Net Payment	(5)	___	___	___	___	___	___	___	___	(5)=(3) minus (4)
Performance Payment	(6)	___	___	___	___	___	___	___	___	(6)=Int. rate times (4)*

*Interest rate based upon the effective cost of the utility's last senior securities' issuance, *or if no senior security, upon the prime rate at the utility's principal place of business in the State of Oregon.*

Attachment A

Avoided Cost Estimation
(For Use by Potential Qualifying Facility Sponsors)

The attached worksheet can be used to compute an estimate of the per kwh payments you can receive in each year of either a levelized or a nonlevelized contract under which you sell power (firm energy and capacity) to an Oregon electric utility.

Levelized Contracts

Under a levelized contract, the payments you receive will reflect an average of the utility's short-term and long-term avoided costs. Because short-term avoided costs are substantially less than long-term avoided costs, postponing your project will significantly increase your payments.

To estimate the payments you will receive under a levelized contract, follow the steps outlined below.

1. Decide on the year that you expect to begin delivering power.

2. Decide how long the contract will last.

3. On the worksheet, fill in Column B with all the years during which the contract will be effective. *Example*: if you will begin delivering power under a 35-year contract in 1985, put 1985 in Column B next to the number 1, 1986 next to the number 2, and so forth. In this example, you would end up with 2019 in Column B next to the number 35.

4. If you plan on less than a 35-year contract, cross out the remaining rows in every column.

5. In Appendix A, find the levelized capacity payment that corresponds to the year you plan to begin deliveries and the length of contract you desire. Enter that number in all the rows of Column C on the worksheet.

6. Calculate the cents per kwh available from the capacity payment by multiplying the appropriate conversion factor by the number in Column C. For Pacific Power & Light, the conversion factor is .1957. For CP National, Idaho Power, and Portland General Electric, the conversion factor is .1826. Put this result in each row of Column D. As in Column C, all of the numbers in Column D should be the same.

7. In Appendix B, find the levelized fixed energy payment that corresponds to the year you plan to begin deliveries and the length of contract you desire. Put that number in all of the rows under Column E of the worksheet.

8. In Appendix C, find the variable energy prices applicable to each year of your contract and put them in Column F of the worksheet. Generally, you will use the price from the last column of Appendix C. For years past 1992, multiply the last known price by 1.06 to obtain an estimate of the following year's price.

9. Add Columns D, E, and F. The result is an estimate of the price you could be paid in each year of your contract.

If you do several of these computations, you will notice that you gain a price advantage both when you increase the length of a contract and when you delay a contract's beginning date to a later time (when power surpluses may be smaller).

Nonlevelized Contracts

To calculate the payments you would receive under a nonlevelized contract, a similar procedure is used. The basic difference is that up to the date of completion of the next conventional generating facility by the utility, you will receive the year-by-year avoided costs of the utility. After that date, you will receive levelized avoided costs which are higher than the levelized costs you would receive under a (fully) levelized contract.

The steps are:

Steps 1-4: As for a levelized contract.

5(a). Obtain the year of completion of the next generating facility by the utility from Appendix D. For years of delivery up to (but not including) that date, enter in the rows of Column C the payments from part (a) of Appendix D.

5(b). Calculate the number of remaining years in your contract. *Example:* if the last year of your contract (i.e., the last year in which you will be delivering power) is 2010, and 1992 is that date of the next generating facility of the utility, then your contract will have 2010 – 1992 + 1 = 19 remaining years. Enter in *each* remaining row of Column C the levelized payment from part (b) of Appendix D which corresponds to the remaining years of your contract.

6. As for a levelized contract (except that the numbers in Column D up to, but not including, the date of the next generating facility by the utility are different from each other, while those subsequent to that date are the same.)

7(a). For years of delivery up to (but not including) the date of completion of the next generating facility by the utility, enter in the rows of Column E the payments from part (a) of Appendix E.

7(b). Enter in *each* remaining row of Column E the levelized payment from part (b) of Appendix E which corresponds to the remaining years of your contract.

Steps 8 and 9: As for a levelized contract.

NOTE: Appendix F contains a brief description of the next conventional generating facility of the utility not already under construction. It is assumed that this is the plant which will be deferred by additional conservation, cogeneration, or renewable resources.

bk/19170-6

Attachment

WORKSHEET

FOR COMPUTING PRICES TO BE PAID TO QUALIFYING FACILITIES

A	B	C	D	E	F	G
Year In Contract	Calendar Year	Capacity Price ($/KW-Month)	Converted Capacity Price (Cents/KWH)	Fixed Energy Price (Cents/KWH)	Variable Energy Price (Cents/KWH)	Total Price (Cents/KWH) D + E + F
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						

A	B	C	D	E	F	G
Year In Contract	Calendar Year	Capacity Price ($/KW-Month)	Converted Capacity Price (Cents/KWH)	Fixed Energy Price (Cents/KWH)	Variable Energy Price (Cents/KWH)	Total Price (Cents/KWH) D + E + F
13						
14						
15						
16						
17						
18						
19						
20						
21						
22						
23						
24						
25						
26						

A	B	C	D	E	F	G
Year In Contract	Calendar Year	Capacity Price ($/KW-Month)	Converted Capacity Price (Cents/KWH)	Fixed Energy Price (Cents/KWH)	Variable Energy Price (Cents/KWH)	Total Price (Cents/KWH) D + E + F
27						
28						
29						
30						
31						

LEVELIZED CAPACITY PAYMENTS
($/KW-MONTH)

NUMBER OF YEARS IN CONTRACT	YEAR IN WHICH DELIVERIES BEGIN									
	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
15										
20										
25										
30										
35										

LEVELIZED FIXED ENERGY PAYMENTS
(CENTS/KWH)

NUMBER OF YEARS IN CONTRACT	YEAR IN WHICH DELIVERIES BEGIN									
	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
15										
20										
25										
30										
35										

VARIABLE ENERGY PRICES
(CENTS/KWH)

CALENDAR YEAR	NONFIRM ENERGY PRICES			FIRM ENERGY PRICES		
	ON-PEAK	OFF-PEAK	AVERAGE	ON-PEAK	OFF-PEAK	AVERAGE
1983						
1984						
1985						
1986						
1987						
1988						
1989						
1990						
1991						
1992						

NOTE: THIS TABLE MAY NOT GIVE ACCURATE PRICES FOR SHORT-TERM CONTRACTS WHICH START AFTER THE DATE OF THE NEXT GENERATING FACILITY OF THE UTILITY.

Nonlevelized Capacity Payments
($/KW-MONTH)

Year of completion of next generating facility by utility ___.

a. Prior Nonlevelized Capacity Payments

Year:	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Payment:										

b. Subsequent Levelized Capacity Payments

Remaining Contract Years:		1	2	3	4	5	6	7	8	9
Payments:										
Remaining Contract Years:	10	11	12	13	14	15	16	17	18	19
Payments:										
Remaining Contract Years:	20	21	22	23	24	25	26	27	28	29
Payments:										
Remaining Contract Years:	30	31	32	33	34	35				
Payments:										

Nonlevelized Fixed Energy Payments
(CENTS/KWH)

Year of completion of next generating facility by utility ___.

a. Prior Nonlevelized Fixed Energy Payments

Year:	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Payment:										

b. Subsequent Levelized Fixed Energy Payments

Remaining Contract Years:		1	2	3	4	5	6	7	8	9
Payments:										
Remaining Contract Years:	10	11	12	13	14	15	16	17	18	19
Payments:										
Remaining Contract Years:	20	21	22	23	24	25	26	27	28	29
Payments:										
Remaining Contract Years:	30	31	32	33	34	35				
Payments:										

Oregon Revised Statutes, §§758.500 *et seq.*

COGENERATION AND SMALL POWER PRODUCTION FACILITIES

758.500 Definitions for ORS 469.320 and 758.500 to 758.550. As used in ORS 469.320 and 758.500 to 758.550:

(1) "Cogeneration facility" means a facility that:

(a) Produces energy as a by-product of its normal industrial process and the energy produced can be used for industrial, commercial, heating or cooling purposes; and

(b) Is more than 50 percent owned by a person who is not a public utility, an electric utility holding company or an affiliated interest.

(2) "Small power production facility" means a facility that:

(a) Produces energy primarily by the use of biomass, waste, solar energy, wind power, water power, geothermal energy or any combination thereof;

(b) Is more than 50 percent owned by a person who is not a public utility, an electric utility holding company or an affiliated interest; and

(c) Has a power production capacity that, together with any other facility located at the same site, is not greater than 80 megawatts.

(3) "Person" means an individual, firm, partnership, corporation, association, cooperative, municipality or their agent, lessee, or trustee, not primarily engaged in furnishing electric service to consumers.

(4) "Public utility" means a utility regulated by the Public Utility Commissioner under ORS chapter 757 or any other utility that provides electrical energy to consumers within the State of Oregon, including, but not limited to, municipalities, cooperatives and people's utility districts.

(5) "Avoided cost" means the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself or purchase from another source but for the purchase from a cogeneration facility or a small power production facility. [1979 c.730 §2; 1981 c.714 §1]

Note: Sections 5 and 6, chapter 714, Oregon Laws 1981, provide:

Sec. 5. ORS 758.500 is repealed July 1, 1983, and section 6 of this Act is enacted in lieu thereof.

Sec. 6. As used in ORS 469.320 and 758.500 to 758.550:

(1) "Cogeneration facility" means a facility:

(a) Which produces energy as a by-product of its normal industrial process and the energy produced can be used for industrial, commercial, heating or cooling purposes; and

(b) Which is owned by a person who is not primarily engaged in the generation or sale of energy.

(2) "Small power production facility" means a facility:

(a) Which produces energy solely by the use of biomass, waste, a renewable resource or any combination thereof;

(b) Which is owned by a person who is not primarily engaged in the generation or sale of energy, other than the energy produced from the small power production facility; and

(c) Which has power production capacity which together with any other facilities located at the same site is not greater than 80 megawatts.

(3) "Person" means an individual, firm, partnership, corporation, association, cooperative, municipality or their agent, lessee, or trustee, not primarily engaged in furnishing electric service to consumers.

(4) "Public utility" means a utility regulated by the Public Utility Commissioner pursuant to ORS chapter 757, which provides heat, light or power to consumers.

(5) "Nonregulated utility" means the Domestic and Rural Power Authority and any other entity not regulated by the Public Utility Commissioner which provides heat, light or power to consumers, including but not limited to municipalities, cooperatives and people's utility districts.

758.510 Utility required to purchase or transmit excess energy from cogeneration or small power production facility protection for utility. Subject to ORS 758.520 and 758.530, a public utility shall purchase or, with the consent of the owner of the cogeneration or small power production facility, may transmit to another public utility any energy produced by a person who operates a cogeneration or small power production facility provided the person and all facilities and equipment operated by such person meet all safety and operating requirements necessary to adequately protect public utility consumers and all systems, facilities and equipment belonging to the public utility. [1979 c.730 §3; 1981 c.714 §2]

Note Section 7 and 8, chapter 714, Oregon Laws 1981, provide:

Sec. 7. ORS 758.510 is repealed July 1, 1983, and section 8 of this Act is enacted in lieu thereof.

Sec. 8. Subject to ORS 758.520, a public or a nonregulated utility shall purchase any excess energy produced by a person who operates a cogeneration or small power production facility provided the person and all facilities and equipment operated by such person meet all safety and operating

requirements necessary to adequately protect utility consumers and all systems, facilities and equipment belonging to the utility.

758.520 Authority of commissioner; rulemaking; content of rules. Notwithstanding any other provision of law, the Public Utility Commissioner shall have jurisdiction over public utilities for the purpose of enforcing the provisions of ORS 758.500 to 758.530 and shall promulgate rules relating to the terms and conditions of purchases to be made by public utilities. The rules also shall:

(1) Establish safety and operating requirements necessary to adequately protect:

(a) Public utility customers; and

(b) All systems, facilities and equipment of the public utility; and

(2) Be substantially consistent with applicable standards required by the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617). [1979 c.730 §4; 1981 c.714 §3]

Note: Sections 9 and 10, chapter 714, Oregon Laws 1981, provide:

Sec. 9. ORS 758.520 is repealed July 1, 1983, and section 10 of this Act is enacted in lieu thereof.

Sec. 10. A public utility or a nonregulated utility that purchases excess energy from a person who operates a cogeneration or small power production facility shall compensate that person at a just and reasonable rate so as not to burden other consumers of the utility and to give due consideration to the quality of energy sold.

758.530 Rate for purchases by public utilities; commissioner to annually set base rate. (1) Purchases by a public utility from a cogeneration facility or a small

power production facility shall be at a rate that is no less than the greater of:

(a) The avoided cost of the service area utility; or

(b) The rate set by the Public Utility Commissioner under subsection (2) of this section.

(2) At least annually, the Public Utility Commissioner shall establish a base rate for purchases of electric energy that is based upon the cost of generation from the highest-cost permanent base load plant then serving Oregon consumers that is owned and operated by a public utility. [1979 c.730 §5; 1981 c.714 §4]

Note: Sections 11 and 12, chapter 714, Oregon Laws 1981, provide:

Sec. 11. ORS 758.530 is repealed July 1, 1983, and section 12 of this Act is enacted in lieu thereof.

Sec. 12. In order to encourage cogeneration and small power production, when necessary the operator of a cogeneration or small power production facility may apply to the commissioner for an order requiring a public utility to offer to sell energy to a person who operates a cogeneration or small power production facility or to offer to purchase energy from the operator of such a facility. The Commissioner shall order the public utility to make such an offer at a compensation rate which is just and reasonable and does not unreasonably burden other consumers of the utility if the commissioner finds:

(1) Safety and operating requirements will be met which are necessary to adequately protect utility consumers and all systems, facilities and equipment of the utility; and

(2) The sale or purchase is not in conflict with applicable standards lawfully required by the Public Utility Regulatory Policies Act of 1978.

758.540 [1979 c.730 §6; repealed by 1981 c.714 §13]

Note: Section 14, chapter 714, Oregon Laws 1981, was enacted in lieu of ORS 758.540 and becomes operative on July 1, 1983. See sections 13 and 15, chapter 714, Oregon Laws 1981. Section 14, chapter 714, Oregon Laws 1981, provides:

Sec. 14.(1) In order to encourage cogeneration and small power production, upon a request by the operator of a cogeneration or small power production facility, a nonregulated utility shall offer to sell electric or other useful forms of energy to an operator of a cogeneration or small power production facility or offer to purchase electric or other useful forms of energy from such operator. The nonregulated utility shall offer to sell or to purchase the energy at a compensation rate which is just and reasonable and does not unreasonably burden consumers of the utility if it finds:

(a) Safety and operating requirements will be met which are necessary to adequately protect utility consumers and all systems, facilities and equipment of the utility; and

(b) The sale or purchase is not in conflict with applicable standards lawfully required by the Public Utility Regulatory Policies Act of 1978.

(2) If the operator of a cogeneration or small power production facility and the nonregulated utility are unable to agree on the terms and conditions for the sale of electric or other useful forms of energy from the cogeneration or small power production facility, the operator and the nonregulated utility shall each appoint an arbitrator and the two appointed shall appoint a third arbitrator to make a final decision binding on the parties by majority vote on the terms and conditions for the sale or purchases.

758.550 Status of cogenerator or small power producer. No cogenerator or small power producer shall become a public utility within the meaning of ORS 757.005 on account of sales made under this section. [1979 c.730 §7]

758.515 Legislative findings. The Legislative Assembly finds and declares that:

(1) The State of Oregon has abundant renewable resources.

(2) It is the goal of Oregon to:

(a) Promote the development of a diverse array of permanently sustainable energy resources using the public and private sectors to the highest degree possible; and

(b) Insure that rates for purchases by an electric utility from, and rates for sales to, a qualifying facility shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest.

(3) It is, therefore, the policy of the State of Oregon to:

(a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens; and

(b) Create a settled and uniform institutional climate for the qualifying facilities in Oregon. [1983 c.799 §2]

758.520 [1979 c.730 §4; 1981 c.714 §3, repealed by 1981 c.714 §9 and by 1983 c.799 §9]

758.525 Electric utilities to file avoided cost schedules; requirement to purchase energy from qualifying facilities. (1) At least once every two years each electric utility shall prepare, publish and file with the commissioner a schedule of avoided costs equaling the utility's forecasted incremental cost of electric resources over at least the next 20 years. Prices contained in the schedules

filed by public utilities shall be reviewed and approved by the commissioner.

(2) An electric utility shall offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility. Except as provided in subsection (3) of this section, the price for such a purchase shall not be less than the utility's avoided costs. At the option of the qualifying facility, exercised before beginning delivery of the energy or energy and capacity, such prices may be based on:

(a) The avoided costs calculated at the time of delivery; or

(b) The projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred.

(3) Nothing contained in ORS 543.610, 757.005 and 758.505 to 758.555 shall be construed to require an electric utility to pay full avoided-cost prices for a purchase from a qualifying facility on which construction began before November 8, 1978, but the price for a purchase from such a facility shall be sufficient to encourage production of energy or energy and capacity.

(4) The rates of an electric utility for the sale of electricty shall not discriminate against qualifying facilities. [1983 c.799 §3]

758.530 [1979 c.730 §5; 1981 c. 714 §4; repealed by §11 and by 1983 c.799 §9]

758.535 Criteria for qualifying facility; terms and conditions of energy sale.

(1) The commissioner shall establish minimum criteria that a cogeneration facility or small power production facility must meet to qualify as a qualifying facility under ORS 543.610, 757.005 and 758.505 to 758.555.

(2) The terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall:

(a) Be established by rule by the commissioner if the purchase is by a public utility.

(b) Be adopted by an electric cooperative or people's utility district according to the applicable provision of ORS chapter 62 or 261; and

(c) Be established by a municipal utility according to the requirements of the municipality's charter and ordinance.

(3) The rules or policies adopted under subsection (2) of this section also shall:

(a) Establish safety and operating requirements necessary to adequately protect all systems facilities and equipment of the electric utility and qualifying facility;

(b) Be consistent with applicable standards required by the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617); and

(c) Be made available to the public at the commissioner's office. [1983 c.799 §4]

758.540 [1979 c.730 §6; repeal by 1981 c.714 §13]

758.545 Electric utility required to make good faith effort to transmit energy from qualifying facility. (1) If an

electric utility fails to make a good faith effort to comply with a request from a qualifying facility to transmit energy or energy and capacity produced by the qualifying facility to another electric utility or to the Bonneville Power Administration, the electric utility shall purchase the qualifying facility's energy or energy and capacity at a price which is the higher of:

(a) The electric utility's avoided cost; or

(b) The index rate.

(2) As used in this section, "good faith effort" shall be demonstrated by the electric utility's publication of a generally applicable, reasonable policy of the electric utility to allow a qualifying facility to use the electric utility's transmission facilities on a cost-related basis. [1983 c.799 §5]

758.550 [1979 c.730 §7; repealed by 1983 c.799 §9]

758.555 Qualifying facility does not become public utility by selling energy. A qualifying facility shall not become a public utility within the meaning of ORS 757.005 on account of sales made under ORS 543.610, 757.005 and 758.505 to 758.555. [1983 c.799 §6]

758.990 [Renumbered 757.992]

T. NELSON: (PP&L) "Tom Nelson, Pacific Power and Light Company. I briefly conferred in the back of the room before I came up here with the representative of the Oregon Public Utilities Commissioner. The – my understanding, number one, is that CP National is now using the Idaho Power avoided cost prices for purchases from co-generators, and I also understand that CP National's contract with Idaho Power is terminating in 1984 . . .

H. BURKITT: Right.

T. NELSON: And, thereafter, the anticipation is the cost of power for CP National will be substantially increased. Therefore, I think it's a fair guess, in the energy business you can only, but it's a fair guess, that the four major investor-owned utilities in the state will have roughly comparable prices for purchases based upon thermal plants in the future. So, I'm not sure that I share Mr. Burkitt's concern.

H. BURKITT: Well, I would think and hope that's what happens, but I'd say that it's anybody's guess.

T. NELSON: Well, right now, again, I would reiterate that CP National is using Idaho Power's avoided cost schedules and those schedules are quite high." [House Subcomm. on HB 2320 of the House Comm. on Environment & Energy, March 17, 1983 (Hearing tape 194, side A).]

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

SNOW MOUNTAIN PINE CO Appellant Petitioner v. PUBLIC UTILITY COMMISSION Respondent/Respondent CP NATIONAL CORP Respondent/Respondent OREGON TRAIL ELECTRIC CONSUMER Respondent/Respondent	)	ORDER DENYING REVIEW CA A62055 SC S37454

The Court has considered the petition for review and ORDERS that it be denied.

DATE: November 20, 1990.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

SNOW MOUNTAIN PINE COMPANY,

Appellant,

v.

PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON and CP NATIONAL CORPORATION, a California corporation,

Respondents,

and

OREGON TRAIL ELECTRIC CONSUMERS COOPERATIVE, INC.,

Intervenor – Defendant – Respondent.

APPELLATE JUDGMENT

(A8812-06809, A8907-03971; CA A62055)
(Filed Aug. 1, 1990)

Appeal from Circuit Court, Multnomah County.

William C. Snouffer, Judge.

Argued and submitted July 6, 1990.

Mildred J. Carmack, Portland, argued the cause for appellant. With her on the briefs were Paul E. Levy, Boise, Idaho, and Donald A. Haagensen, David F. Bartz, Jr., and Schwabe, Williamson & Wyatt, Portland.

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent Public Utility Commission. With him on the brief were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Janet A. Metcalf, Assistant Attorney General, Salem.

John W. Gould, Portland, argued the cause for respondent CP National Corporation. With him on the brief were George L. Wagner and Spears, Lubersky, Bledsoe, Anderson, Young & Hilliard, Portland.

Thomas A. Balmer, Portland, argued the cause for respondent Oregon Trail Electric Consumers Cooperative, Inc. With him on the brief were Lindsay, Hart, Neil & Weigler, Portland, and Henry C. Lorenzen and Corey, Byler, Rew, Lorenzen & Hojem, Pendleton.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

PER CURIAM

Affirmed.

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

(SEAL)

WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE (503) 248-3986

July 31, 1989

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Re: Snow Mountain Pine Co. v. PUC, CP National, and Oregon Trail Electric, A8812-06809

Dear Counsel:

This case is another step in the continuing saga of the PUC's case UM-11. In 1985 these proceedings came before this court for judicial review in *Snow Mountain Pine Co. v. Maudlin,* A8501-00567. In that case I ruled that there was a binding contract between CP National Corp. and Snow Mountain Pine Co. as of July 6, 1983, by which CP was required to purchase electricity from Snow Mt. I further ruled that CP was required to pay for the cogenerated electricity at rates established by the "avoided cost" schedule of Feb., 1983, which was in effect in July, 1983.

On further appeal, the Court of Appeals affirmed the conclusion that the binding date of the contract is July 6, 1983, but the court reversed the second part of my opinion and remanded the case to the PUC for further proceedings. *Snow Mountain Pine Co. v. Maudlin,* 84 Or App 590 (1987). The concluding paragraph of that opinion states:

> "The part of the circuit court judgment saying that the purchase price is to be determined from the "avoided cost" schedule on file July 6, 1983, is reversed; otherwise the judgment is affirmed; the commissioner's order is reversed and remanded for a determination of CP National's actual "avoided costs" as of July 6, 1983, projected over the life of the obligation; appeal dismissed as to Idaho Power."

Following efforts by Snow Mt. to modify the Court of Appeal's ruling, the matter was returned to the PUC for further proceedings. The file was reopened and additional evidence (66 exhibits filling two boxes) was received. The PUC's review resulted in its Order 88-1419, dated December 5, 1988 (Ex. #66), and was preceded by

ancillary Orders 88-153, Feb. 8, 1988 (Ex. #18); Order 88-246, March 8, 1988 (Ex. #20), Order 88-527, May 12, 1988 (Ex. #29), and Order 88-589, May 31, 1988 (Ex. #34).

This case is before the court for judicial review of those orders pursuant to ORS 756.580-756.610. The court allowed Oregon Trail Electric Consumers Co-Op to intervene because it now is contractually liable for CP's obligations under the Snow Mt. contract.

Because there is substantial evidence in the record to support the commission's findings of fact, and because its conclusions are reasonable and lawful, Order 88-1419 will be affirmed.

On remand from the Court of Appeals, the PUC had two jobs to perform: (1) To determine CP's actual "avoided costs" as of July 6, 1983; and (2) To determine the actual "avoided costs" projected over the life of the contract.

In order to assist the PUC in achieving the first obligation, the Court of Appeals gave the commission some guidance. It stated that CP's "avoided costs" schedule on file with the commission in July, 1983 (i.e., the Feb. 1983 schedule), was not controlling or binding but was only "a starting point" for calculating the purchase price. 84 Or App at 600. It stated "that the rate to be paid by a utility for power is to be based on the utility's *actual* 'avoided costs' vis-a-vis the particular qualifying facility on the date the obligation is incurred, projected to apply over the life of the obligation. 84 Or App at 600. Very significantly, however, the court also said "CP's actual 'avoided costs' may be different from the schedule of 'avoided costs' on file in July, 1983." 84 Or App at 601.

In fact they were different. The "avoided costs" schedule on file in July, 1983, was the Feb., 1983, schedule of Idaho Power, not CP. The PUC therefore was correct when it looked at the Feb., 1983, schedule for its "starting point," concluded that it was not applicable to CP (See Ex. 66 at 3, 7), and then proceeded to follow the court's mandate and determine CP's actual avoided costs. In other words, CP's actual avoided cost as of July 6, 1983, was the wholesale rate which the utility paid to Idaho Power and *not* Idaho Power's avoided costs as reflected in the Feb., 1983, schedule. The PUC properly looked at the Feb., 1983, schedule when it started to compute actual avoided costs pursuant to the mandate and properly concluded that that schedule did not apply to CP. It then proceeded to calculate the actual avoided costs.

Snow Mountain says that the Feb., 1983, schedule is not only the "starting point" but also the ending point; that the schedule is both Alpha and Omega. The argument is that the Court of Appeals mandated only that the schedule be modified or adjusted by the regulatory factors of OAR 860-29-040(6); that such adjustment had already occurred, unbeknownst to this Court or the Court of Appeals; and that therefore the schedule should be reinserted into the contract. But the Court of Appeals ordered otherwise. Snow Mountain's Herculean efforts to persuade the PUC to reinstate the Feb., 1983, schedule into the contract were properly rejected. They likewise are rejected by this court.

The PUC has determined correctly that CP's avoided cost on July 6, 1983, was the wholesale rate (purchase price) it paid to Idaho Power on that date: 1.76¢ per kWh.

(See Ex. 66, p. 7.) That finding is supported by substantial evidence in the record. (See Ex. 28, Staff/1, pp. 7-8.)

The second part of the remand order was to require a "determination of CP National's actual 'avoided costs' . . . projected over the life of the obligation. . . . "

To go forward from July 6, 1983, over the term of the contract and to determine future avoided costs, the commission calculated them according to mathematical models with parameters set by data available on or before July 6, 1983. Cost estimates of future additions to Idaho Power's power resource base were factored in, based on Idaho Power's Feb., 1983, avoided cost schedule, with appropriate subtractions from the Data Resources, Inc., escalation rates. PUC's computation of CP's levelized, avoided costs, in Order 88-1419 (p. 10), is amply supported in the record, generally by Mr. McNamee's testimony and specifically by Exhibit Staff/10, McNamee/1, attached to Ex. 59 (filed 9/29/88).

Because the commission's order is reasonable and lawful, and supported by substantial evidence, it is affirmed. Plaintiff's First Claim in its Amended Complaint will be dismissed.

The Second Claim alleges generally that the contract implementation dates must be modified. That claim has not been argued orally so it is not decided. Perhaps the issue is moot, because I have stayed implementation dates for the duration of this appeal. But perhaps the issue needs to be decided in order to lodge a final, appealable judgment. I urge counsel to agree on a solution to this issue; otherwise I will schedule an additional hearing.

Counsel for the defense should prepare an appropriate order for the court's signature.

Very truly yours,

/s/ William C. Snouffer
WILLIAM C. SNOUFFER
Circuit Court Judge

WCS/pd

cc: Mr. Don Haagensen
Mr. David Bartz
Mr. Henry Lorenzen
Mr. Tom Balmer

ORDER NO. 88-1419

ENTERED DECEMBER 5 1989

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 11

SNOW MOUNTAIN PINE COMPANY, Complainant, vs. CP NATIONAL CORPORATION, Defendant.	)	ORDER

INTRODUCTION

This case was remanded by the Oregon Court of Appeals to the Public Utility Commission "for determination of CP National's actual 'avoided costs' as of July 6,

1983, projected over the life of the obligation." *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 601, 734 P2d 1366, *rev den* 303 Or 591 (1987). *See also* PUC Order No. 84-895 (1984).

On February 8, 1988, in compliance with *Snow Mountain Pine Co. v. Maudlin, supra*, the Commission, by Order No. 88-153, directed the parties and staff to submit their estimates of CP National Corporation's (CPN) avoided costs as of July 6, 1983. The Commission provided the parties and staff an opportunity to reply to each other's estimates. At CPN's request, filing times were extended by Order No. 88-246. CPN was given to April 8, 1988 to file its actual avoided costs as of July 6, 1983, projected over the life of the obligation. Snow Mountain and Staff had 30 days to respond. Reply comments to the various responses were to be made within 20 days. At Snow Mountain's request, the time to file reply comments was extended to June 27, 1988 by Order No. 88-589.

PROCEDURAL MATTERS

Snow Mountain submitted numerous interrogatories to Staff and CPN, some of which were objected to. Snow Mountain requested an order compelling answers. It also moved to strike portions of Staff's comments. Snow Mountain's motions to compel responses to its interrogatories, and to strike portions of staff's comments, are denied.

As noted above, the procedure which the Commission adopted in Order No. 88-153 directed CPN to file its actual avoided cost as of July 6, 1983, projected over the life of the obligation. Snow Mountain and Staff were

given opportunities to file their own estimates, and to comment on others' estimates. The parties, CPN and Snow Mountain, did not desire a hearing.

Interrogatories were not contemplated or authorized under the procedure adopted in Order No. 88-153. Furthermore, even if interrogatories were permissible, Snow Mountain's requests to CPN were untimely filed in that the requests were not made until June 29, 1988, and its requests to Staff were improper because Staff is not a "party" in this proceeding. Order No. 88-153, page 3. *See* OAR 860-14-070.

Moreover, Snow Mountain's interrogatories are irrelevant to this remand proceeding and are unlikely to lead to evidence relevant to the proceeding. Requiring answers would serve no useful purpose here. Indeed, Snow Mountain contends that, "[f]or reasons repeatedly briefed in this remand proceeding, the best 'estimate of CPN's avoided cost,' is the avoided cost schedule on file [for CPN] on July 6, 1983." Accordingly, Snow Mountain urged "that the record be closed." Snow Mountain's letter of August 16, 1988, to the Hearings Officer. Thus, Snow Mountain has not shown that it has been prejudiced by CPN's and Staff's refusal to answer all of its interrogatories.

Snow Mountain's motions to strike comments of the Staff are denied. As the Commission ruled in Order No. 88-153, Staff's role in this remand proceeding is to assist the Commission in determining CPN's avoided cost as of July 6, 1983, projected over the life of the obligation. Snow Mountain's arguments against Staff's projections of CPN's avoided costs go to the weight to be accorded

those projections, not to their admissibility. *See* Order No. 88-153. *See also* OAR 860-14-045(1).

The Commission denies all pending motions of the parties and issues this order establishing CPN's avoided costs as of July 6, 1983.

FILINGS OF ESTIMATED AVOIDED COSTS

CPN[1] has been a long-term wholesale power customer of Idaho Power Company. CPN was planning to continue to purchase a substantial portion of its power requirements from Idaho Power Company (Idaho Power) at rates set by the Federal Energy Regulatory Commission (FERC). This Commission cannot challenge the reasonableness of the rates set by the FERC, and thus, ratepayers will pay the cost incurred by CPN at such rates. Because of the adversarial nature of the FERC ratesetting procedure, CPN asserts that it cannot take or endorse positions against its own and its ratepayers' interest in this proceeding that could be used by Idaho Power Company in future FERC proceedings to try to get higher wholesale purchase rates.

On April 8, 1988, CPN presented its estimates of its avoided costs from July 6, 1983, through 1988. However, the utility did not present any estimates of its avoided costs for future years. CPN's position is that it cannot

---

[1] On October 5, 1988, the CPN electric service territory was purchased by Oregon Trail Electric Consumers Cooperative. The Commission issues this order in compliance with the Court of Appeals' mandate to determine CPN's avoided cost as of July 6, 1983.

predict with reasonable certainty whether, or when, the FERC-approved rates might change, or if changed, whether the new FERC-approved rates would be higher or lower than the present rates of $4.062 per kW/month for demand and $.018339 per kWh for energy. CPN proposed an indexing approach to qualifying facility (QF) power purchase pricing.

Snow Mountain originally did not file an avoided cost estimate for CPN but asserted that the avoided cost schedule that was on file for CPN in February 1983 should be used. However, that schedule was actually Idaho Power Company's avoided costs and not CPN's avoided costs. On October 20 1988, Snow Mountain filed an avoided cost estimate based upon Idaho Power's February 1983 avoided costs.

Staff proposed to use avoided cost estimates based upon a long-range forecast using certain Data Resources, Inc., (DRI) escalators and "resource addition" information derived from Idaho Power's February 1983 avoided cost filing. Staff based its forecasts upon information available on, or prior to, the July 6, 1983, calculation date. Staff made a second estimate which considered specific nonavoidable plant additions that were listed in Idaho Power's February 1983 avoided cost filing.

FEDERAL AND STATE LAW

The Public Utility Regulatory Policies Act (PURPA), § 210(b), 16 USC § 824a-3(b), precludes the Federal Energy Regulatory Commission (FERC) from requiring a rate that exceeds full "avoided costs" to the electric utility of alternative electric energy:

> . . . Rates for such purchase –
>
> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.
>
> No such rule prescribed under subsection (a) shall provide a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

Section 292.304 requires that the rates for purchases be just and reasonable to the electric consumer and in the public interest and "nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases." 18 CFR sec. 292.304(a)(2).

Full avoided cost is the maximum rate that the Commission can prescribe and is the incremental cost to the utility of electric energy that the utility would generate itself or purchase from another source but for the purchase from a qualifying facility. See ORS 758.505(1), OAR 860-29-010(1), 860-29-040(4)(b)(B). *Snow Mountain Pine Co. v. Maudlin, supra,* 84 Or App at 595-596 and 600-601. *See also American Paper Inst. v. American Elec. Power,* 461 U.S. 402, 413, 103 S.Ct. 1921, 76 L.Ed.2d 22, 32 (1983).

A utility's actual avoided costs may change from the estimate in the filed avoided cost schedule as a utility's power requirements change. These changes can occur as a result of purchases from qualifying facilities or other utilities, the addition of generating resources, or a change in the projected energy surplus or deficit. Actual avoided

costs also may change as a result of changes in overall power supply and demand conditions.

In adopting the initial cogeneration rules, the Commissioner in Order No. 81-319, page 2, stated that the basic philosophy in establishing these rules is that utilities should pay the full avoided cost of energy and capacity obtained from qualifying facilities, but that paying more than the full avoided cost for the energy and capacity increases utility costs and rates over what they would have been had no purchases from qualifying facilities been arranged.

> Payments which are, on a total present value basis over the life of the project, beyond full avoided cost will be disallowed in setting revenue requirements in general rate cases unless prior specific approval has been received from the Commissioner.
>
> . . .
>
> The Commissioner desires to provide maximum economic incentives for development of qualifying facilities while ensuring that the costs of such development do not adversely impact utility ratepayers who ultimately pay these costs. The Commissioner will generally attempt to maintain this balance by requiring purchases of power from qualifying facilities at the purchasing utility's incremental generation and or purchase costs, thereby costing the ratepayers no more than the cost of the utility's own generation or wholesale purchases.
>
> Order No. 81-319, pages 2 and 3.

The Court of Appeals' mandate directed the Commission to determine the actual avoided cost of CPN.

The FERC's filing requirement for avoided costs of an all-requirements utility provides:

> With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

18 CFR sec. 292.302(c)(ii)

ORS 758.505(1) states:

> "Avoided costs" means the incremental cost to an electric utility of electric energy or energy and capacity that the utility would generate itself or *purchase* from another source but for the purchase from a qualifying facility. (Emphasis supplied.)

As explained in the FERC's commentary to its cogeneration rules as published on page 12219 of the Federal Register, Vol. 45, No. 38, February 25, 1980:

> If . . . the purchasing utility is a nongenerating utility, its avoided costs will be the price of bulk purchased power ordinarily based on the average embedded cost of capacity and average energy costs of its supplying utility's system. As a result, the rate to the qualifying facility will be based on those average costs.

CPN's actual avoided cost on July 6, 1983, was the wholesale rate (purchase price) it paid to Idaho Power (its supplier) on that date. This is in accordance with the definition of "avoided costs" in ORS 758.501(1), OAR 860-29-010(1) and with the FERC rules in effect on July 6, 1983.

DETERMINATION OF AVOIDED COSTS

CPN is a nongenerating utility which since 1949 has met its power requirements through a FERC-approved wholesale purchase agreement with Idaho Power Company. CPN does not propose to build any generating facilities in the near or long-term future. The contract between CPN and Idaho Power was subject to renewal. CPN is a long-term purchaser of power from Idaho Power, and under these circumstances, the FERC ordinarily has not permitted a wholesale power producer to abruptly cancel its commitments to the retail utility company. Also, by July 1, 1983, Idaho Power was in a surplus power situation and would likely continue to supply CPN's power requirements for the foreseeable future. CPN would continue to purchase power from Idaho Power, the most economical source of power during the subject period.

On October 20, 1988, Snow Mountain submitted supplemental testimony in response to testimony submitted by staff. Snow Mountain used the avoided cost schedule on file for CPN on July 6, 1983, which was Idaho Power's February 1983 avoided cost schedule, to determine CPN's avoided costs rather than starting from CPN's actual avoided cost.

The Commission finds that the power costs that CPN avoids by purchasing cogeneration power from Snow Mountain is the cost of the power that Idaho Power sells to CPN at the FERC-regulated rate. On July 6, 1983, the wholesale rate paid by CPN to Idaho Power Company was 1.76 cents per kWh. Idaho Power's 1983 avoided costs are not CPN's incremental costs for purchase power.

The Commission recognizes that, irrespective of how eloquent and detailed the assumptions and methodology behind calculation of avoided costs may be, dynamic market conditions imply that estimated avoided costs, as with any prediction of the future, belong in the realm of uncertainty.

Staff calculated two models. The objective of staff's original analysis was to calculate an estimate of CPN's avoided costs for a 25 year time horizon (1983-2007). Staff used the 1983 wholesale rate CPN paid to Idaho Power of 1.76 cents per kWh as a benchmark for the calculation of a 25-year avoided cost stream. Avoided cost projections for the years 1984 through 1988 were calculated using the cost-trend forecast provided in the *Utility Cost Forecasting Update*, 1st quarter 1983, Data Resources, Inc. In addition, capacity and energy costs associated with Idaho Power Company's projected new resource additions, as listed in its February 1983 avoided cost filing, were included in the mathematical formulation that staff developed for projecting CPN's avoided costs in years 1989 through 2007. The model was developed subject to the constraint that only data available on or before July 6, 1983, could be used in the analysis.

Essentially, the model calculates an annual avoided cost estimate by updating the previous year's avoided cost value through use of escalation rates listed in the first quarter 1983 DRI *Utility Cost Forecasting Update*. In years when Idaho Power Company would be adding a new resource to its system (as identified in the Idaho Power Company February 1983 avoided cost filing), the model incorporates the new resource's capacity and energy costs into the calculation of CPN's avoided cost.

Basically, new resource costs are added to CPN's avoided cost in proportion to their relative contribution to Idaho Power Company's system capacity. This method was used by Staff because Idaho Power Company's wholesale rate is in general based on its system average cost of capacity and energy.

Snow Mountain criticized Staff's avoided cost study for failing to include Idaho Power's nonavoidable resource additions. In its February 1983 avoided cost filing, Idaho Power listed three nonavoidable plants: (1) Cascade Dam on the Payette River, listed as a 12.8 MW facility with an estimated in-service date of September 1983; (2) Valmy II, which is the second unit of a coal plant (Idaho's portion is 125 MW) with an estimated in service date of June 1985; and (3) Swan Falls Dam to be rebuilt by January 1987 with its capacity increased by 12.2 MW. In response to Snow Mountain's comments, Staff incorporated the nonavoidable resource costs into the model which it used to estimate CPN's avoided costs.

In its October 20, 1988, filing, Snow Mountain criticizes staff's estimate of CPN's avoided costs as grossly under-estimating Idaho Power's new resource costs and for using a 75 percent capacity factor for Idaho Power's generating system.

Idaho's February 1983 avoided cost filing assumes a 75 percent capacity factor for its generating system.

Idaho Power's new resource additions and the costs of each new resource addition (except for Valmy II) were derived directly from Idaho Power's February 1983 avoided cost filing. The Valmy II cost estimate was derived from Idaho Power's August 1982 avoided cost

filing. These new resource additions and the total estimated per unit cost are as follows:

Year	Name	Type	Capacity (MW)	Cost (Cents/kWh) (Nominal $)
1984	Cascade	Hydro	12.8	7.22
1985	Valmy II	Coal	125.0	9.21
1987	Swan Falls	Hydro	12.2	7.66
1989	Lucky Peak	Hydro	87.5	7.99
1991	Banks	Hydro	99.0	8.37
1993	Ferncroft	Hydro	174.0	8.79
1996	Wiley	Hydro	86.0	9.53
1997	Kanaka	Hydro	20.0	9.80
1998	Coal #1	Coal	125.0	10.10
2001	Coal #2	Coal	125.0	11.08

These new resource cost estimates are incorporated on a proportional basis into Staff's calculation of CPN's avoided cost stream. Snow Mountain provided only a cursory explanation of why these cost estimates are "grossly underestimated" and provided no documentation or analysis to support its assertion.

On November 17, 1988, Snow Mountain filed supplemental testimony stating that staff's analysis does not follow general ratemaking principles and restating its assertion that a 75 percent capacity factor is inappropriate. The purpose of staff's analysis was not to determine Idaho Power's resource revenue requirements, but rather to estimate CPN's avoided costs for a 25-year time frame subject to the constraint that only data available on or before July 6, 1983 be used in the analysis. Given this constraint, Idaho Power's February 1983 avoided cost filing represents the best available information on the cost of new resource development for Idaho Power's

system. An avoided cost methodology using the "ratemaking principles" suggested by Snow Mountain would require a complex model formulation in which the revenue requirement over the expected life of each of Idaho Power's new resource additions listed in Idaho Power's February 1983 avoided cost filing would need to be estimated. In its testimony, Snow Mountain did not present such an analysis. Thus, there is no empirical information in the record from which to conclude that a "ratemaking" model formulation suggested by Snow Mountain would result in avoided cost estimates which are more accurate over time or that would differ from Staff's estimates.

Since Staff's analysis uses Idaho Power's February 1983 filing as the source of Idaho's new resource cost estimates, the 75 percent capacity factor is the appropriate value to use.

The original model accounts for nonavoidable or unidentified changes in capacity costs by escalating capacity costs over time by the DRI forecast rates. This escalation of capacity costs was a proxy for the addition of nonavoidable plants as well as other unidentified capacity costs that could be incurred in the time frame following the resource additions listed in Idaho Power's February 1983 avoided cost filing.

Staff's second model specifically incorporates the estimated costs of Cascade, Valmy II, and Swan Falls facilities into the avoided cost calculation. Since these plants have been specifically considered, the DRI escalation rates have to be removed from the capacity portion of the avoided cost calculation in the years 1983 through 2001 to avoid double-counting of capacity cost changes.

Capacity costs in the year 2002 and beyond are escalated by the average rate of change in capacity costs which occurred in the model between 1983 and 2001. This average rate is 5.89 percent. This is the best available estimate of how the capacity portion of CPN's avoided costs will change in the year 2002 and beyond. The annual change in the energy portion of CPN's avoided costs for the year 2002 and beyond is 7 percent which is based on the average change in the DRI escalation rate.

The Commission adopts Staff's estimate using the latest model, which is utility-specific, as the best estimate of CPN's avoided costs as of July 6, 1983, as follows:

CP National's Avoided Costs
(Levelized)
(July 6, 1983)

	CAPACITY		ENERGY
	($/kw/mo)	(cents/kwh)	(cents/kwh)
1990	11.39	1.56	2.06
1991	11.39	1.56	2.24
1992	11.39	1.56	2.40
1993	11.39	1.56	2.63
1994	11.39	1.56	2.81
1995	11.39	1.56	3.00
1996	11.39	1.56	3.25
1997	11.39	1.56	3.48
1998	11.39	1.56	3.78
1999	11.39	1.56	4.04
2000	11.39	1.56	4.33
2001	11.39	1.56	4.69
2002	11.39	1.56	5.01
2003	11.39	1.56	5.36
2004	11.39	1.56	5.74
2005	11.39	1.56	6.14
2006	11.39	1.56	6.57

	CAPACITY ($/kw/mo)	CAPACITY (cents/kwh)	ENERGY (cents/kwh)
2007	11.39	1.56	7.03
2008	11.39	1.56	7.52
2009	11.39	1.56	8.05
2010	11.39	1.56	8.61
2011	11.39	1.56	9.22
2012	11.39	1.56	9.86
2013	11.39	1.56	10.55
2014	11.39	1.56	11.29

The form of contract attached to Order No. 84-895 shall be modified by the parties to comply with the court determination and the avoided cost as determined in this order. Snow Mountain will be granted until the end of the business day on December 30, 1988, in which to determine whether to sign such contract and file it with the Commission. Various dates in the proposed contract need to be adjusted for the new signing date. Snow Mountain suggested that the time spans contained in the proposed contract be adjusted greater than that originally stated. The reasons given by Snow Mountain are not persuasive. The following dates will preserve the approximate time spans contained in Order No. 84-895, and the contract is amended as follows:

Article II, December 31, 2014
Article III E, May 1, 1990
Article III F, May 1, 1990
Article X C, December 1, 1989
Article X D, December 1, 1989

In addition, Schedule C to the contract, Firm Energy and Demonstrated Capacity Payments for Contracts of Varied Duration, requires modification to reflect the new dates and is attached hereto as Appendix "A."

ORDER

IT IS ORDERED that the avoided costs as found in this Order be inserted in the contract attached to Order No. 84-895.

Made, entered, and effective DECEMBER 5 1988.

/s/ Ron Eachus
RON EACHUS
Commissioner, Chair

/s/ Myron B. Katz
MYRON B. KATZ
Commissioner

/s/ Nancy Ryles
NANCY RYLES
Commissioner

(SEAL)

EXHIBIT J

ORDER NO. 88-527
ENTERED MAY 12 1988

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 11

SNOW MOUNTAIN PINE COMPANY,	)	
Complainant,	)	ORDER
vs.	)	
CP NATIONAL CORPORATION,	)	
Defendant.	)	

On April 8, 1988, Snow Mountain Pine Company petitioned the Commission to reconsider its order No. 88-153.

On April 13, 1988, CP National filed its Reply to the Petition for Reconsideration.

On April 21, 1988, Staff filed its response.

The Petition has been reviewed. Snow Mountain's motion alleges that Order No. 88-153 "reflects a misunderstanding of Snow Mountain's motions and reflects a forced reading of the remand instruction of the Court of Appeals in *Snow Mountain Pine Company v. Maudlin*, 84 Or. App. 590, 734 P2d 1366 (1987) and is contrary to the newly discovered evidence in the Commission files."

The petition is denied. Snow Mountain's petition does not even explain how the order reflects a misunderstanding of the motions, is inconsistent with the Court of Appeals decision, or how the "new" evidence is relevant to its argument. The petition is merely a recitation of alleged facts without a context. The Commission will not speculate about what arguments Snow Mountain might put forward to advance its petition.

IT IS THEREFORE ORDERED that the Petition for Reconsideration filed by Snow Mountain Pine Company is denied and dismissed.

Made, entered, and effective MAY 12 1988.

/s/ Ron Eachus
RON EACHUS
Commissioner, Chair

/s/ Myron B. Katz
MYRON B. KATZ
Commissioner

/s/ Nancy Ryles
NANCY RYLES
Commissioner

(SEAL)

ORDER NO. 88-153
ENTERED FEBRUARY 8 1988

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 11

SNOW MOUNTAIN PINE COMPANY,	)	
Complainant,	)	ORDER
vs.	)	
CP NATIONAL CORPORATION,	)	
Defendant.	)	

This matter is before the Commission on remand from the Court of Appeals.

Snow Mountain Pine Company (Snow Mountain) filed a complaint with the Public Utility Commission to compel CP National Corporation (CPN), a regulated non-generating electric utility, to purchase power from Snow Mountain, a qualifying cogeneration facility (QF), and to determine the rate to be paid for the power purchased. The Commission ordered CPN to purchase power at CPN's "avoided cost" at the time of publication of Order No. 84-895. The Circuit Court, Multnomah County, affirmed the order requiring CPN to purchase power, but held that the wrong avoided cost schedule was used to determine price. On appeal, the Court of Appeals of Oregon held:

> The part of the circuit court judgment saying that the purchase price is to be determined from the "avoided cost" schedule on file July 6, 1983, is reversed; otherwise the judgment is affirmed; the commissioner's order is reversed and

remanded for a determination of CP National's actual "avoided costs" as of July 6, 1983, protected over the life of the obligation; appeal dismissed as to Idaho Power.

Snow Mountain Pine Co. v. Maudlin, 84 Or. App. 590, 601, 734 P.2d 1366 (1987).

A stipulation was entered into between Snow Mountain, CPN, Idaho Power Company, and the Public Utility Commission staff, agreeing that defendant Idaho Power Company is no longer a proper party to this proceeding.

Boise Cascade Corporation filed a Petition to Intervene as an "Interested Party." There is no provision in the Commission's rules for an "interested party," only "parties" and "interested persons." (See OAR 860-11-035 and OAR 860-11-065.) Interested person status affords the opportunity to submit testimony, but not to cross-examine or appeal the final agency decision. No objections were expressed at the November 13, 1987, prehearing conference to allow Boise Cascade Corporation interested person status. If Boise Cascade Corporation is not satisfied with this status, it should file an objection within 10 days of this order. Otherwise, it will be allowed to participate only as an interested person.

Snow Mountain filed five motions on November 13 and December 4, 1987. Briefs in support and opposition to the motions have been filed.

Motion One: The PUC should abandon the hearings process and enter a final order inserting the February, 1983 price schedule into the Snow Mountain contract.

Motion Two: Snow Mountain requests a mandatory settlement meeting that includes the Commission, principals from each party that have authority to settle the matter, and counsel.

Motion Three: The CPN avoided cost schedule of February 1983 is valid and binding for CPN's obligation to Snow Mountain which arose in July, 1983.

Motion Four: No further evidence on CPN's avoided cost is necessary or relevant, and any such evidence should be excluded.

Motion Five: In order for Snow Mountain to have a fair hearing, the PUC staff must be declared a party.

Motions One, Three, and Four are interrelated and are concerned with the scope of the Commission's proceedings on remand from the Court of Appeals. They will be dealt with together.

In a nutshell, Snow Mountain wants this Commission to declare that the CPN avoided cost schedule on file on February, 1983 was CPN's actual avoided cost on July 6, 1983, even though the filing was actually Idaho Power's avoided cost. It was this February, 1983 schedule that the Circuit Court adopted. The Court of Appeals specifically reversed the Circuit Court on this point and remanded the matter to the Commission to determine CPN's "actual 'avoided cost' as of July 6, 1983, projected over the life of the obligation; . . . . "

Granting Snow Mountain's motion would ignore the Court of Appeals opinion and its remand, and would be contrary to the court's determination that the Circuit Court decision simply to use the "avoided cost" schedule

on file was error. Therefore, Motions One, Three, and Four must be denied.

The rule of the case requires the Commission to determine CPN's actual avoided cost as of July 6, 1983, projected over the life of the obligation. CPN will be required to file evidence of its actual avoided cost as of July 6, 1983, projected over the life of the obligation. Snow Mountain and Commission staff will be given an opportunity to respond.

Motion Two, Snow Mountain request for a mandatory settlement conference among the principals, including the Commission, is inappropriate. Parties are encouraged to attempt to settle cases. If agreement is reached, then the Commission must decide whether the settlement is in the public interest and should be accepted. The Commission will not participate in the settlement conference proposed by Snow Mountain.

Motion Five requests that the Commission staff be made a party to these proceedings. Snow Mountain "seeks to have all contacts between the staff and the commission published, distributed to all parties and made part of the record. *See* OAR 860-12-015." Snow Mountain Memorandum in Support of Motions, page 68. OAR 860-12-015 (3) excludes staff from being a party for purposes of the ex parte contact rule.

Staff shall disclose its position as to the appropriate avoided costs, but staff will not be made a party. Staff will be available to assist the Commission at its direction to determine CPN's actual avoided cost as of July 6, 1983, projected over the life of the obligation.

IT IS THEREFORE ORDERED that:

1. Idaho Power Company is dismissed from these proceedings.

2. Boise Cascade Corporation is designated as an interested person.

3. Snow Mountain Pine Company's Motions One, Two, Three, Four, and Five are denied.

4. Within 30 days, CP National Corporation shall file its actual avoided cost as of July 6, 1983, projected over the life of the obligation together with testimony and exhibits. Snow Mountain Pine Company and Commission Staff shall have 30 days from the filing to respond to the report. Reply comments on the various responses shall be made within 20 days.

Made, entered, and effective FEBRUARY 8 1988.

/s/ Ron Eachus
RON EACHUS
Commissioner, Chair

/s/ Paul Cook
PAUL COOK
Commissioner

/s/ Nancy Ryles
NANCY RYLES
Commissioner

(SEAL)

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SNOW MOUNTAIN PINE COMPANY, Plaintiff-Respondent, v. GENE MAUDLIN, Public Utility Commissioner of the State of Oregon Defendant-Appellant, and CP NATIONAL CORPORATION, a potential interested party, or Defendant-Appellant, and IDAHO POWER COMPANY, a potential interested party, Defendant-Respondent.	)	Multnomah Circuit Court No. A8501-00567 CA A37762 ORDER DENYING MOTION TO MODIFY ORDER OF REMAND

Respondent Snow Mountain Pine Company has moved for modification of the Court's order of remand. The motion is denied.

/s/ John Buttler
John Buttler, Presiding Judge

SEP 8 1987
Date

c: Mildred J. Carmack
John Wiley Gould
Ronald L. Williams
Virginia L. Linder
Multnomah County Circuit Court Clerk

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, SALEM, OR 97310

IN THE SUPREME COURT OF THE STATE OF OREGON

SNOW MOUNTAIN PINE CO Petitioner v. MAUDLIN,GENE CP NATIONAL CORP IDAHO POWER CO Respondents	)))))))))	ORDER DENYING REVIEW CA A37762 SC S34003

The Court has considered the petition for review and ORDERS that it be denied.

DATE: JULY 08, 1987.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

CARMACK, MILDRED JEAN	Attorney for: Petitioner
LEVY, PAUL E	Attorney for: Petitioner
WON, W BENNY	Attorney for: Respondent
BATCHELOR, JEFFREY M	Attorney for: Respondent
WILLIAMS, RONALD L	Attorney for: Respondent

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SNOW MOUNTAIN PINE CO Plaintiff Respondent/Cross-appellant v. MAUDLIN,GENE CP NATIONAL CORP Defendants Appellant/Cross-respondents IDAHO POWER CO Defendant Respondent	)	ORDER DENYING RECONSIDERATION CA A37762 SC S34003

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on JUNE 12, 1987, denied the petition. ORAP 10.10. The Supreme Court may now proceed to determine whether to grant review. The appellant court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 11.03.

S/GEORGE M. JOSEPH
CHIEF JUDGE

COPIES TO:

Carmack, Mildred Jean	Attorney for: Respondent/Cross-appellant
Levy, Paul E	Attorney for: Respondent/Cross-appellant
Won, W Benny	Attorney for: Appellant/Cross-respondent
Batchelor, Jeffrey M	Attorney for: Appellant/Cross-respondent
Williams, Ronald Ledru	Attorney for: Respondent

Argued and submitted June 27, 1986, affirmed in part, reversed and remanded in part April 8, reconsideration denied June 12, petition for review denied July 8, 1987

(303 Or 591)

SNOW MOUNTAIN PINE COMPANY,
Respondent,

v.

MAUDLIN,
Appellant,

and

CP NATIONAL CORPORATION,
Appellant,

and

IDAHO POWER COMPANY,
Respondent below.

(A8501-00567; CA A37762)

734 P2d 1366

Qualifying cogeneration facility filed complaint with Public Utility Commissioner asking commissioner to compel regulated nongenerating electric power distributor to purchase power from cogeneration facility, and to determine rate to be paid for power so purchased. Commissioner ordered utility to purchase power, approved contract, and set purchase rate at utility's avoided costs on file with commissioner at time of publication of his order, and appeal was taken. The Circuit Court, Multnomah County, William C. Snouffer, J., affirmed commissioner's order requiring utility to purchase power, but held that commissioner had used wrong avoided cost

schedule to determine price, and reversed commissioner in part and remanded for preparation of contract reflecting rate based upon earlier avoided cost schedule. Utility and commissioner appealed. The Court of Appeals, Buttler, P. J., held that: (1) date on which qualifying cogeneration facility obligated itself to provide power by tendering agreement to electrical utility determined date for which avoided costs were to be determined in calculating purchase price, and (2) appropriate purchase price for electricity from qualifying cogeneration facility was not rate stated in electric utility's "avoided costs" schedule on file with Public Utility Commissioner, but rather, rate was to be based upon utility's actual avoided costs.

Affirmed in part and reversed and remanded in part.

1. Electricity – Regulation in general; statutes and ordinances – Regulation of charges

Electrical utility's obligation to purchase power from qualifying cogeneration facility is imposed by law on utility; it is not voluntarily assumed. ORS 758.525.

2. Electricity – Regulation in general; statutes and ordinances – Regulation of charges

Qualifying cogeneration facility's self-imposed obligation to deliver energy to electrical utility triggers utility's obligation to purchase energy; thus, date on which qualifying facility obligates itself to deliver energy fixes date on which "avoided costs" are determined for purposes of establishing purchase price.

3. Electricity – Regulation in general; statutes and ordinances – Regulation of charges

Electric utility's obligation to purchase from qualifying cogeneration facility is not contingent on agreed price; rather, price, although subject to negotiation, can be determined, at election of qualifying facility, according to guidelines in regulations and administrative rules.

4. Electricity – Regulation of charges – In general

Date on which qualifying cogeneration facility obligated itself to provide power by tendering agreement to electrical utility determined date for which avoided costs were to be determined in calculating purchase price.

5. Electricity – Regulation of charges – In general

Appropriate purchase price for electricity from qualifying cogeneration facility was not rate stated in electric utility's "avoided costs" schedule on file with Public Utility Commissioner, but rather, rate was to be based upon utility's actual avoided costs.

CJS, Electricity § 30.

Appeal from Circuit Court, Multnomah County.

William C. Snouffer, Judge.

W. Benny Won, Assistant Attorney General, Salem, argued the cause for appellant Gene Maudlin, Public Utility Commissioner. With him on the briefs were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Thomas E. Twist, Assistant Attorney General, Salem.

Jeffrey M. Batchelor, Portland, argued the cause for appellant CP National Corporation. With him on the briefs were John W. Gould, Marvin D. Fjordbeck and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland.

Donald A. Haagensen, Portland, argued the cause for respondent Snow Mountain Pine Company. With him on the brief were Paul E. Levy, Spokane, Washington, Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Richardson and Rossman, Judges.

BUTTLER, P.J.

Part of circuit court judgment that purchase price be determined from "avoided cost" schedule on file on July 6, 1983, reversed; otherwise judgment affirmed; commissioner's order reversed and remanded for determination of CP National Corporation's actual avoided costs as of July 6, 1983, projected over life of obligation; appeal dismissed as to Idaho Power.

BUTTLER, P. J.

Snow Mountain filed a complaint with the Public Utility Commissioner asking the commissioner to compel CP National Corporation (CP), a regulated nongenerating electric power distributor, to purchase power from Snow Mountain Pine Company (Snow Mountain), a qualifying cogeneration facility, and to determine the rate to be paid for the power so purchased. The commissioner ordered CP to purchase power, approved a contract and set the purchase rate at CP's "avoided cost" on file with the

commissioner at the time of the publication of his order, September, 1984.[1]

The circuit court affirmed the commissioner's order requiring CP to purchase power from Snow Mountain but held that the commissioner had used the wrong "avoided cost" schedule to determine the price. It reversed the commissioner in part and remanded for the preparation of a contract reflecting a rate based on the "avoided cost" schedule on file in July, 1983. Both CP and the commissioner appeal the circuit court's order.[2]

We review the commissioner's order under ORS 756.594 and ORS 756.598(1) and may disturb it only if it is not supported by substantial evidence or is unreasonable or unlawful. *Market Transport v. Maudlin*, 301 Or 727, 725 P2d 914 (1986).

Cogeneration facilities simultaneously produce two forms of useful energy, such as electric power and steam. They use significantly less fuel to produce the two types of energy together than would be required to produce the two types separately. *See* 45 Fed Reg 12215 (1980). To encourage the conservation of oil and gas by electric

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[1] The commissioner issued two orders. The first, PUC Order No. 84-263, resolved the question of CP's obligation to purchase power, but did not decide the rate. The second, PUC Order No. 84-895, decided that the rate should be based on the "avoided costs" on file as of September, 1984.

[2] Idaho Power was dismissed from the case by the circuit court; however, the commissioner's notice of appeal lists Idaho Power as an adverse party. Because the commissioner's brief states that Idaho Power is not a party to the appeal, and it has not appeared, we dismiss the appeal as to it.

utilities, Congress enacted section 210 of the Public Utility Regulatory Policies Act of 1978, 16 USC § 824a-3 (PURPA). *FERC v. Mississippi*, 456 US 742, 750, 102 S Ct 2126, 72 L Ed 2d 532 (1982). That section requires the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration and small power production. FERC's rules require electric utilities to offer to purchase electric energy from "qualifying energy facilities." 16 USC § 824a-3(a).

State regulatory authorities are required to implement FERC's regulations within one year after they are promulgated. 16 USC § 824a-3(f)(1). Oregon has enacted legislation that closely parallels the federal statute, and the commissioner has, in turn, prescribed administrative rules, which, with a few exceptions, are substantively the same as the federal regulations.

ORS 758.505(2)(a) defines a "cogeneration facility" as a facility that

> "[p]roduces, through the sequential use of energy, electric energy and useful thermal energy including but not limited to heat or steam, used for industrial, commercial, heating or cooling purposes."

A cogeneration facility is a "qualifying facility" as defined by PURPA rules and Oregon law. 18 CFR § 292.101(b)(1); ORS 758.525(8).

ORS 758.515 states the legislature's goals and policies with respect to the encouragement of qualifying facilities:

> "(1) The State of Oregon has abundant renewable resources.

"(2) It is the goal of Oregon to:

"(a) Promote the development of a diverse array of permanently sustainable energy resources using the public and private sectors to the highest degree possible; and

"(b) Insure that rates for purchases by an electric utility from, and rates for sales to, a qualifying facility shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest.

"(3) It is, therefore, the policy of the State of Oregon to:

"(a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens; and

"(b) Create a settled and uniform institutional climate for the qualifying facilities in Oregon."

Electric utilities are required to purchase all energy made available by a qualifying facility at a price sufficient to encourage the production of energy. 18 CFR § 292.303(a); ORS 758.525(2); OAR 860-29-030(1).[3]

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[3] OAR 860-29-030(1) provides:

"(1) Obligations to purchase from qualifying facilities: Each electric utility shall purchase, in accordance with OAR 860-29-040, any energy and capacity in excess of station service (power necessary to produce generation) and amounts attributable to conversion losses, which is made available from a qualifying facility:

"(a) Directly from a qualifying facility in its service territory; or

"(b) Indirectly from a qualifying facility in accordance with section (4) of this rule."

Although an electric utility and a qualifying facility are free to negotiate the rate and terms of any purchase, 18 CFR § 292.301(b)(1); OAR 860-29-005(2), the price paid must not be less than the utility's "avoided costs." ORS 758.525(2).[4] "Avoided costs" are defined in ORS 758.505(1) as

> "the incremental costs to an electric utility of electric energy or energy and capacity that the utility would generate itself or purchase from another source but for the purchase from a qualifying facility."

A utility is required regularly to provide "[s]ufficient data concerning its avoided costs * * * to allow the owner or operator of the qualifying facility to estimate, with reasonable accuracy, the payment it would receive from the utility" for power. OAR 860-29-080(1). In addition, at least every two years, utilities must file a schedule of avoided costs in a forecast covering at least the next 20

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[4] ORS 758.525(2) provides:

> "An electric utility shall offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility. Except as provided in subsection (3) of this section, the price for such a purchase shall not be less than the utility's avoided costs. At the option of the qualifying facility, exercised before beginning delivery of the energy or energy and capacity, such prices may be based on:
>
> "(a) The avoided costs calculated at the time of delivery; or
>
> "(b) The projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred."

years. The schedule are reviewed and approved by the commissioner. ORS 758.525(1).

If a qualifying facility elects to provide power pursuant to a "legally enforceable obligation," the facility may choose to have the purchase price based on the utility's "avoided costs" calculated at the time of delivery, or the "avoided costs" projected to apply over the life of the obligation, as calculated "at the time the obligation is incurred." ORS 758.525(2); OAR 860-29-040(4)(b).[5] Snow Mountain has chosen the latter method.

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[5] OAR 860-29-040 provides, in part:

"(1) Rates for purchases by electric utilities shall:

"(a) Be just and reasonable to the ratepayers of the electric utility and in the public interest; and

"(b) Be in accordance with this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

"(2) Nothing in this Division authorizes any electric utility to pay more than its avoided costs for purchases unless expressly allowed by these rules or by the Commissioner.

"(3) Establishing rates:

"(a) Except for qualifying facilities in existence prior to November, 1978, a rate for purchases satisfies the requirements of section (1) of this rule if the rate equals the avoided costs or base rate, whichever is higher, and determined after consideration of the factors set forth in section (6) of this rule.

"(b) When the rates for purchases are based upon estimates of avoided costs over a specific term

(Continued on following page)

The commissioner's order describes the course of negotiations between Snow Mountain and CP, which

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(Continued from previous page)

of the contract or other legally enforceable obligation, the rates do not violate these rules if any payment under the obligation differs from avoided costs.

"(c) Nothing in these rules shall be construed as requiring payment of avoided-cost prices to qualifying facilities in existence prior to November, 1978; provided, however, that prices for such purchases shall be sufficient to encourage continued power production.

"(4) Rates for purchases – time of calculation. Except for the purchases made under section (5) of this rule, standard rates, each qualifying facility shall have the option to:

"(a) Provide non-firm energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided non-firm energy avoided cost or base rate in effect when the energy is delivered; or

"(b) Provide firm energy and/or capacity pursuant to a legally enforceable obligation for the delivery of energy and/or capacity over a specified term, in which case the rates for such purchase shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on:

"(A) The avoided costs calculated at the time of delivery; or

"(B) The avoided costs projected to apply over the life of the obligation as calculated at the time the obligation is incurred; or

(Continued on following page)

began in earnest in May, 1983, and continued until September, 1983. The parties discussed the quantity of power

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(Continued from previous page)

"(i) The base rate in effect at the time of initial delivery; or

"(ii) The base rate in effect when the obligation is incurred.

" * * * * *

"(6) Factors affecting rates for purchases: In determining avoided costs and for determining base rate the following factors shall, to the extent practicable, be taken into account:

"(a) The data provided pursuant to OAR 860-29-080(2) and the Commissioner's evaluation of the data:

"(b) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

"(A) The ability of the utility to dispatch output of the qualifying facility;

"(B) The expected or demonstrated reliability of the qualifying facility;

"(C) The terms of any contract or other legally enforceable obligation;

"(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

"(E) The usefulness of energy and/or capacity supplied from a qualifying facility during system

(Continued on following page)

and the rate at which it would be purchased. They considered various rates, including those based on CP's August, 1982, February, 1983, and September, 1983, "avoided cost" schedules on file with the commissioner. Snow Mountain favored use of the earlier "avoided cost" schedules, which reflected a higher rate. The parties agree that on July 6, 1983, officials of Snow Mountain presented CP with a contract in which Snow Mountain agreed to deliver power to CP over a period of years at rates based on the August, 1982, "avoided cost" schedule on file with the commissioner. CP's representative told Snow Mountain that CP would agree to the August, 1982,

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(Continued from previous page)

emergencies, including its ability to separate its load from its generation;

"(F) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

"(G) The smaller capacity increments and the shorter lead times available, if any, with additions of capacity from qualifying facilities.

"(c) The relationship of the availability of energy and/or capacity from the qualifying facility as derived in subsection (6)(b) of this rule, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

"(d) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of energy and/or capacity."

rate only if the commissioner would permit CP to pass the rate on to its customers. Negotiations fell through at that point.

When negotiations reached an impasse, Snow Mountain filed a complaint with the commissioner, pursuant to OAR 860-29-005.[6] The commissioner determined that CP had an obligation to purchase power from Snow Mountain. In a second order, he held that CP had incurred that obligation at the time of the publication of the commissioner's second order, which decided that the rate for the purchase should be determined on the basis of CP's most recent "avoided cost" schedule on file. The circuit court held that CP's obligation to purchase power arose in July, 1983, when Snow Mountain tendered a contract to provide power,[7] and that the "avoided cost" schedule on file at the time of the tender was the proper schedule to be used in determining the purchase rate.

The dispute now concerns only the rate to be paid for the power; the answer depends on the resolution of two questions: (1) when the obligation to purchase power was incurred and (2) whether the "avoided cost" schedules

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[6] OAR 860-29-005(3) provides:

> "In the event of an impasse in negotiations between an electric utility and a qualifying facility, either party may request a determination by the commissioner of the matter at issue."

[7] The circuit court also held that the obligation was incurred at that point, because of the operation of promissory estoppel. Because we agree with the court's analysis on the effect of the tender of the contract, we do not address the question of promissory estoppel.

filed by CP are binding for the purpose of settling the purchase price or whether actual "avoided costs" must be used.

CP contends that, for purposes of determining the time for calculation of a utility's "avoided costs," an obligation to purchase power is incurred only when the utility and a qualifying facility execute a written contract for the purchase of power or when the commissioner issues an order determining the contract terms for the parties in a case brought before him pursuant to OAR 860-29-005(3). It asserts that an obligation is not incurred by a qualifying facility's unilateral presentation of a contract, the terms of which have not been agreed upon.

1. CP's obligation is not governed by common law concepts of contract law; it is created by statutes, regulations and administrative rules. ORS 758.525 requires a utility to purchase power from a qualifying facility. Similarly, 18 CFR 292.303(a) and OAR 860-29-030 provide that an electric utility "shall purchase" any energy and capacity "which is made available from a qualifying facility." Thus, the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed.

2. ORS 758.525 allows a qualifying facility to choose to have the purchase price calculated on the basis of avoided costs calculated *at the time the legal obligation to purchase energy is incurred*. The regulations and administrative rules explain the emphasized language. A qualifying facility has the option either to provide energy "as available." 18 CFR § 292.304(d)(1); OAR 860-29-040(4)(a), or to provide it "pursuant to a legally enforceable obligation." 18 CFR 292.304(d)(2); OAR 860-29-040(4)(b). If, as

here, the latter option is chosen, the qualifying facility may, again at its option, base the purchase rate on the utility's "avoided costs calculated at the time the obligation is incurred." 18 CFR 292.304(d)(2)(ii); OAR 860-29-040(4)(b)(B). The "obligation" referred to for this purpose is the *qualifying facility's* obligation to *provide* energy. That conclusion is supported by the fact that OAR 860-29-010 defines the "time the obligation is incurred" as the date on which a binding obligation first exists to *deliver* energy. Thus, the regulations and administrative rules contemplate that a qualifying facility's self-imposed obligation *to deliver energy* triggers a utility's obligation *to purchase energy*. The date on which the qualifying facility obligates itself to deliver energy fixes the date on which the "avoided costs" are determined.

3. A utility's obligation to purchase is not contingent on an agreed price. The price, although subject to negotiation, 18 CFR 292.301(b); OAR 860-29-005(2), can be determined, at the election of the qualifying facility, according to the guidelines in the regulations and administrative rules. *See* 45 Fed Reg 12217 (1980). If, by the qualifying facility's choice, the rate is to be the utility's "avoided costs at the time the obligation is incurred," the fact that the price is not agreed upon when the qualifying facility obligates itself to provide power does not change the date on which the obligation is incurred or affect the date used for determining the price. If the parties are unable to agree to a price, it will be set by the commissioner pursuant to OAR 860-29-005.

4. To permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks

that we believe Congress and the Oregon Legislature intended to prevent. The FERC commentary to 18 CFR § 292.304(d)(2) suggests that a utility cannot "merely by refusing to enter into a contract," deprive a qualifying facility of its right to commit to sell power in the future at prices which are determined at the time the qualifying facility makes its decision to provide power:

> "[18 CFR § 292.304(d)(2)] permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." 45 Fed Reg 12224 (1980).

We conclude that a qualifying facility has the power to determine the date for which "avoided costs" are to be calculated by tendering an agreement that obligates it to provide power. Snow Mountain obligated itself to provide power on July 6, 1983, and that is when CP became obligated to purchase power.

5. The circuit court held that the appropriate purchase price was the rate stated in CP's "avoided cost" schedule on file with the commissioner in July, 1983. We conclude that the rate for purchase is to be based on CP's *actual* "avoided costs" and that the schedules of "avoided costs" on file do not necessarily reflect actual costs and are not binding.

Rate schedules filed with the commissioner are "forecasts," ORS 758.525(1), and "estimates" of "avoided costs." OAR 860-29-080(2)(a). They provide a starting

point for calculating the rate for the purchase of energy, *see* 45 Fed Reg 1226 (1980), and are to be considered *along with the other factors listed in OAR 860-29-040(6).* OAR 860-29-040(3)(a). Some of those factors require an evaluation of the particular qualifying facility that has incurred the obligation. We conclude that the rate to be paid by a utility for power is to be based on the utility's *actual* "avoided costs" vis-a-vis the particular qualifying facility on the date the obligation is incurred, projected to apply over the life of the obligation. CP's actual "avoided costs" may be different from the schedule of "avoided costs" on file in July, 1983.

We do not agree with the commissioner's contention that this result will "substantially undermine the commissioner's ability to protect utility ratepayers from 'unjust and unreasonable exactions.' " OAR 860-29-040(3) provides that rates based on a utility's "avoided costs" are just and reasonable to the ratepayers and in the public interest. The fact that rates are based upon estimates of "avoided costs" over a specific term of a contract or "other legally enforceable obligation" does not alter that rule. OAR 860-29-040(3)(b). Here, CP must pay for the power at a rate projected from its July, 1983, actual "avoided costs."

The part of the circuit court judgment saying that the purchase price is to be determined from the "avoided cost" schedule on file July 6, 1983, is reversed; otherwise the judgment is affirmed; the commissioner's order is reversed and remanded for a determination of CP National's actual "avoided costs" as of July 6, 1983, projected over the life of the obligation; appeal dismissed as to Idaho Power.

EXHIBIT C

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND OREGON 97204

(SEAL)

WILLIAM CAMPBELL SNOUFFER
CIRCUIT COURT JUDGE

September 30, 1985

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Re: *Snow Mountain Pine Company v. Gene Mauldin and CP National Corporation and Idaho Power Company, No. A8501-00567*

Gentlemen:

This case is before me for judicial review of the Commissioner's Order 84-895 and the ancillary orders, 85-024 and 85-037 (Ex. #'s 89, 95, and 96).[1] The action is brought pursuant to ORS 756.580-756.610.

Order 84-895 requires defendant CP National Corp., (CPN) to purchase cogenerated electrical power from complainant Snow Mountain Pine Company (Snow

Mountain) at the rate of the September, 1984, "avoided costs" approved by the Commissioner.

The main issue is, what are the "avoided costs" that CPN must pay to Snow Mountain for the electricity that Snow Mountain will generate and sell to CPN?

I find by clear and satisfactory evidence that parts of Order 84-895 are unreasonable and unlawful. ORS 756.594. The court will require the Commissioner to modify his order, pursuant to ORS 756.598(1). The modified order will require that Snow Mountain's electricity is to be purchased by CPN at the rate established by the February, 1983, avoided cost schedule. Article XXV of the contract also must be modified.

The Public Utility Regulatory Policies Act (PURPA) was enacted by Congress in 1978. Public Law 95-617, 92 Stat 3117, *codified* generally in 16 USC. The constitutionality of PURPA was upheld in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 US 742, 102 S Ct 2126, 72 LEd 2d 532 (1982). The court observed in that opinion that Congress perceived that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities." 102 S Ct at 2132-2133. The facts of this case, and the long, drawn-out delay in the proceedings before the Commissioner, are a graphic example of Congressional perspicacity.

PURPA was established among other things to encourage cogeneration of electricity. PURPA §210; 16 USCA §824a-3(a); *FERC v. Mississippi, supra*, 102 S Ct 2132-2133; *See also* ORS 758.515.

PURPA required the states to adopt rules and regulations consistent with its provisions. It is not necessary in this case to compare in detail the provisions of Oregon law with the provisions of PURPA. (*See, e.g.*, ORS 758.505-758.555; OAR 860-29-001 to 860-29-090.) Suffice it to say that if there is any conflict, PURPA controls. *FERC v. Mississippi, supra.*

The linchpin in this case is PURPA §210, *codified* as 16 USCA §824a-3. Section 210 requires electric utilities to purchase electric energy from cogenerators at a rate equal to the purchasing utility's full avoided cost. Section 210 was upheld by *American Paper Inst., Inc. v. American Elec. Pow. Serv. Corp.*, 461 US 402, 103 S Ct 1921, 76 LEd 2d 22 (1983). Section 210(a) provides that the Federal Energy Regulatory Commission (FERC) must prescribe rules to encourage cogeneration and small power production of electricity. It provides that the rules will *require* electric utilities, among other things, to offer to purchase electric energy from qualified cogeneration facilities. Section 210(b) provides that the FERC rules must ensure that rates are "just and reasonable . . . and in in the public interest" and that the rates shall not discriminate against cogenerators. Section 210(b) provides that the rates cannot exceed "the incremental cost to the utility of alternative electric energy." Section 210(d) defines the term "incremental cost of alternative electric energy" as what is known as "avoided cost." "Avoided cost" is the incremental cost to an electric utility of electricity that it would generate itself or purchase from another source but for the purchase from a cogenerator. 16 USCA §824a-3(d); *cf.* ORS 758.505(1); OAR 860-29-010.

Snow Mountain is a qualifying electric cogenerator under both federal and state law. In 1983 it offered to sell cogenerated electric power to CPN. In the proceedings below it sought the Commissioner's assistance to require CPN to buy cogenerated electric power at the avoided cost rates then in effect. Snow Mountain asserts that the avoided costs in effect at the time that CPN was legally obligated to buy the cogenerated electric power are the rates that CPN must pay.

Snow Mountain's position is based upon 18 CFR §292.304(d)(2). (*cf.* OAR 860-29-040(4).) The FERC rule clearly gives the qualifying facility, rather than the regulated utility, the choice:

> "To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case *the rates for such purchases shall, at the option of the qualifying facility* exercised prior to the beginning of the specified term, *be based on* either:
>
> > "(i) The avoided costs calculated at the time of delivery; or
> >
> > "(ii) *The avoided costs calculated at the time the obligation is incurred.*" (emphasis added)

Similar language is found in ORS 758.525(2), which also requires the utility to buy the cogenerator's power at "not . . . less than the utility's avoided costs."

Snow Mountain and CPN began negotiating for the purchase by CPN of Snow Mountain's energy in May, 1983. A number of meetings were held. (The Commissioner overlooked the May 27, 1983, meeting.) It was at these meetings that Snow Mountain told CPN that it

could and would generate anywhere from 15 to 27 megawatts of power to be purchased by CPN. Although the August, 1982, rates were discussed, the avoided costs in effect at the time of the negotiations were those of February, 1983. (The February, 1983, avoided cost documents are contained in Ex. #108, #'s SM21, SM33 & SM22; and Ex. #63, Appendix J, App 65-81 [Idaho Power's Feb. 18, 1983 Avoided Cost Submission].)

The parties considered many factors, including the price that should be paid. It is noteworthy that Snow Mountain's witnesses testified that CPN had agreed to the August, 1982, avoided cost rates and CPN's representative, Mr. Rasmussen, did not deny their understanding. (*Compare* Feichtmeir testimony, Ex. #106, p. 9; DeBoer testimony, Ex. #107, p. 3; Tyrer testimony, Ex. #105, pp. 5-7, *with* Rasmussen testimony, Ex. #124 and Transcript, Ex. #99, pp. 243-244.) Nevertheless, the court cannot find any clear and satisfactory evidence that the Commissioner was wrong in concluding that there was no agreement by CPN to the August, 1982, rates. (See, e.g., Ex. #106, pp. 10-12; Ex. #107, pp. 6-7; Ex. #105, pp. 7-8.) However, there was an agreement between the parties for CPN to buy the power.

In reasonable reliance upon their understanding from Mr. Rasmussen that CPN had committed to purchase the power, Snow Mountain spent approximately $250,000 toward completion of the project. The $250,000 were spent in June and July, 1983. (DeBoer testimony, Ex. #107, pp. 5-6; Feichtmeir testimony, Ex. #106, p. 18)

At the time Snow Mountain spent the $250,000 in reasonable reliance upon CPN's representations, a legally

enforceable obligation was incurred within the meaning of 18 CFR §292.304(d) and ORS 758.525(2). Snow Mountain had relied to its detriment on CPN's representation. Contract rights existed from that time forward. *Schafer v. Fraser*, 206 Or 446, 472-481, 493, 290 P2d 190 (1956); *Potter v. Hatter Farms, Inc.*, 56 Or App 254, 641, P2d 628 (1982). *See* IA Corbin, Contracts §§193-209 (1963).

The Commissioner concludes in Order 84-895 (p. 5) that the "legal obligation to purchase the power occurs at the time of publication of this dispositive order." That conclusion is legally inaccurate. *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P2d 427 (1984). The Idaho court affirmed its state commission's order which required the utility to purchase cogenerated power at the avoided cost rates that the commission previously had approved and that were in effect at the time the utility's legal obligation to purchase power was incurred. *Afton* clearly recognizes that the applicable rate is the avoided cost rate in effect at the time the legal obligation to purchase the electricity is incurred. 693 P2d at 433.

In addition to the legally enforceable obligation to purchase which arose in July, 1983, as mentioned previously, Snow Mountain formally tendered a contract to CPN in July, 1983. (Ex. #105, p. 7 and attachment #SM3; Ex. #106, pp. 10-12; Ex. #107, pp. 6-7.) CPN was required to accept the contract. PURPA §210; 18 CFR §292.303(a). The February, 1983, avoided cost schedule was in effect at that time. CPN unlawfully rejected the contract in September, 1983. (Ex. #105, pp. 11-12.)

Order 84-895 is legally inaccurate and factually erroneous to the extent it implies (p. 4) that the February,

1983, avoided cost rates would be a burden to ratepayers and "not in the public interest." There is no factual basis in the record to support the conclusion that the February, 1983, rates are not in the public interest. The Commissioner confuses his responsibility to regulate rates generally to ensure that the public interest is satisfied with his obligation to establish the avoided cost rates. The avoided cost mechanism was adopted by Congress to encourage cogeneration of electricity. Once the avoided cost schedules have been adopted, the public interest is, by definition, satisfied. 16 USCA §824a-3(b) and (d); 18 CFR 292.304; ORS 758.525(2). Congress recognized both that prices may fall after an avoided cost schedule has been adopted and that the rates which must be paid when a legal obligation is incurred can differ from the rates that may prevail at the time electric power is delivered. (*See* 45 Fed Register 12224 and 18 CFR §292.304(b)(5), both cited and discussed in *Afton, supra,* 693 P2d at 433-434 and notes 11 & 12.) Congress specifically enjoined state utility commissioners from subjecting cogenerators to the kind of rate regulation "in the public interest" that applies to utilities generally. (*See* the discussion of this point in *American Paper Inst., supra,* 103 S Ct at 1928-1929; *See also* ORS 758.555.) Thus the Commissioner erred in concluding that, as part of these proceedings, new avoided costs could be established.

In one other respect Order 84-895 is unreasonable. The order requires implementation of the contract attached to the order. Article XXV of the contract is unreasonable. It says that the contract is not effective unless the obligations of the parties and the decisions of

the Commissioner are satisfactory to CPN and its counsel. The court agrees with Snow Mountain that that provision nullifies the contract and is contradictory. Therefore Article XXV of the contract will be amended to delete the language: "satisfactory in scope and form to CPN and its counsel approving CPN's execution and performance of this Agreement."

In all other respects that Commissioner's Order 84-895 and the ancillary Orders, 85-024 and 85-037, are affirmed.

The original of this letter will serve as the court's opinion in this case. ORS 756.598(2). Counsel for Snow Mountain Pine Company should prepare a judgment consistent with this opinion.

Sincerely,

/s/ William C. Snouffer
WILLIAM C. SNOUFFER
Circuit Court Judge

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[1] All documents, transcripts and exhibits used during the hearings process have been marked as Circuit Court Exhibits and have been assigned a number corresponding to the Corrected Supplemental Certificate of Proceedings filed May 16, 1985.

ORDER NO. 84-895
ENTERED NOVEMBER 13 1984

BEFORE THE PUBLIC UTILITY COMMISSIONER
OF OREGON
UM 11

SNOW MOUNTAIN PINE COMPANY, Complainant, vs. CP NATIONAL CORPORATION AND IDAHO POWER COMPANY, Defendants.	)	ORDER

Snow Mountain Pine Company (Snow Mountain) filed a complaint in October 1983 with the Oregon Public Utility Commissioner against CP National Corporation (CPN) alleging that Snow Mountain had offered CPN 20 megawatts of cogenerated power and that CPN refused to purchase the power as required by federal and Oregon law. Snow Mountain requested that the Commissioner issue an order compelling CPN to comply with the law and purchase the power. Snow Mountain also alleged that CPN had agreed to a rate that would be applicable if a purchase were made and requested that the Commissioner establish the rate for purchase.

CPN filed its answer admitting that CPN had refused to buy Snow Mountain's power and alleging that the purchase would adversely overwhelm CPN's electric operations, but that CPN was willing to wheel Snow Mountain's power to another utility in reasonable proximity to Snow Mountain's facility. CPN requested the Commissioner to apply to the Federal Energy Regulatory

Commission for a waiver of federal law requiring the purchase. A prehearing conference was held on January 16, 1984, where it was determined that the threshold question of obligation to purchase and whether a waiver would be applicable would be dealt with first.

On February 13 and 14, 1984, a hearing was held. On April 6, 1984, the Commissioner, by Order No. 84-263, found that CPN is required to purchase the 20 megawatts of power offered by Snow Mountain Pine Company and that whether or not a waiver should apply could not be determined until the rates to be paid by CPN were established. Until the rates are established, it cannot be determined whether the purchases at those rates are just and reasonable to the electric consumer of the utility and in the pubic interest. A conference was held on April 13, 1984, at which time the Hearings Officer, Leon Hagen, directed that the issue of grandfathering rates and the choice of which rate to be applied was requested to be briefed. The briefing was done, and Snow Mountain also tendered a proposed contract at that time. The Hearings Officer directed CPN to respond to that proposed contract, which they did. A further hearing was held on August 7, 1984. Further briefs were filed by the parties. Snow Mountain filed its final brief on September 7, 1984.

The parties have negotiated and have narrowed the issues. The attached form of contract incorporates what the parties have agreed to in addition to minor language changes adopted by the Commissioner. The unresolved issue that this order deals with is the price that CPN should pay to Snow Mountain as CPN's avoided cost.

Snow Mountain is a general partnership between Raymond A. Feichtmeir and Brown's Industries, Inc., Judd DeBoer, President. Messrs. Feichtmeir and DeBoer share in coordination and approval of major decisions regarding Snow Mountain operations.

Snow Mountain was formed for the purpose of acquiring from Edward Hines Lumber Company its pine sawmill located at Hines, Oregon, the Oregon Northwestern Short Line Railroad, certain timber contracts, and other assets. The purchase was made in 1983. Hines had a preliminary design cogeneration project with a predicted net total generation of 38 megawatts, based upon use of supplemental fuel (coal) and General Electric equipment. Snow Mountain revised the Hines plan for cogeneration facility by designing a new smaller facility without coal. The Snow Mountain project involves the burning of mill by-products, unmerchantable lumber, and forest residue to create steam. The steam will be used to turn turbines to generate the electricity. Afterwards, some of the steam remaining is used to heat the facility and to dry lumber in its kilns.

Snow Mountain started formal negotiations with CPN in May 1983. On May 20, 1983, Snow Mountain met with CPN's Mr. Rasmussen, who at that time believed Snow Mountain would generate about 15 megawatts of power. On June 15, 1983, Snow Mountain indicated to Commissioner's staff that it wanted to sell 19 megawatts of power to CPN. On July 6, 1983, Snow Mountain stated that they planned to provide 27 megawatts of power for purchase by CPN.

During this time, August 1982 avoided cost rates were discussed; also, February 1983 and later September 1983 rates. During these discussions CPN indicated that it would sign a contract if the purchase power cost could be recovered from its customers.

On July 13, 1983, another meeting occurred between Snow Mountain, CPN, and staff members, at which time CPN indicated it had a problem with the amount of power being tendered. On August 11, 1983, a meeting between CPN and Snow Mountain took place, where Mr. Rasmussen indicated that CPN would purchase the power at its lower August 1983 filing. Also, CPN suggested that the power should be sold to Idaho Power Company (IPC) or to the Bonneville Power Administration, and again stated that CPN had a problem handling the power and the rate impact question still needed to be resolved by the Commissioner.

A plan was proposed for CPN to purchase the power, but that both parties would work to transport and sell the power to IPC. A preamble agreement and a form of contract was sent to CPN corporate headquarters for review. On August 25, 1983, Snow Mountain met with the Commissioner and staff members. In early September 1983 Mr. Rasmussen informed Snow Mountain that IPC would not willingly purchase the power. On September 15, 1983, CPN officially told Snow Mountain that they would not purchase their power.

The August 1983 rates were not accepted by the Commissioner, but September 1983 rates were accepted for filing.

As can be seen by this chronology of events, serious negotiations took place. Positions changed, but no contract ever was consummated. Even under Snow Mountain's theory, August 1982 rates could not apply since February 1983 rates were already in place when Snow Mountain first started negotiations in May 1983. Negotiations were conducted from May to September 15, 1983, at which time negotiations broke off. The complaint was filed in October 1983. The September 1983 rate was in effect at the commencement of this proceeding.

Snow Mountain believes that since Mr. Rasmussen indicated that CPN would be willing to take the power at its August 1982 avoided cost filing in May 1983 and at other times, that CPN should be required to take the power at August 1982 rates. Mr. Rasmussen's offer was contingent on the Commissioner's approval of the August 1982 prices for the contract. At no time did Snow Mountain negotiate with CPN when the August 1982 prices were in effect. The August 1982 prices are inappropriate for this contract.

Snow Mountain claims that it has a right to August 1982 rates and a contract similar to those that were entered into by CPN with Blue Mountain and Prairie Wood Products, Inc. This case does not involve a case where a utility and the cogenerator agree through negotiations; rather the Commissioner is requested to require CPN to enter into a contract which they do not desire to do. While the Commissioner has persuaded utilities to pay and has approved payment of those rates, the Commissioner has not heretofore ordered a utility to enter into a contract. This is the first case where the Commissioner is required to issue an order.

Cogenerators and utilities may contract for rates different than the avoided rates. See OAR 860-29-005(2)

Avoided cost is defined to mean, "Incremental cost to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility . . . the utility would generate itself or purchase from another source. . . . " OAR 860-29-010(1).

OAR 860-29-040 provides that the rates for purchase be "just and reasonable to the ratepayers . . . and in the public interest." It further provides that nothing in these rules authorizes a utility "to pay more than its avoided cost for purchase unless expressly allowed by these rules or by the Commissioner," and that a purchase satisfies the rule "if the rate equals the avoided cost . . . after consideration of the factors set forth in Section (6) of these rules."

The Commissioner will not approve rates earlier than the September 1983 rates for the contract between CPN and Snow Mountain. The earlier rates would be a burden to the ratepayers and not in the public interest. Snow Mountain alleges in its brief that a September 1983 rate would make the project unfeasible. This may or may not be the case. A cogenerator is not required to supply cost information. The Commissioner must consider the effect of the contract rate on the utility, its customers, and the benefits to the utility power supply system which may be realized through the development of cogeneration facilities. Whether the rate paid by the utility is fair, just, and reasonable is not dependent upon the profit or loss realized by the cogenerator at any given time. The Commissioner's duty is to encourage cogeneration by requiring

the utility to pay its avoided cost. But the Commissioner cannot require a utility to pay an amount greater than its true avoided cost.

PURPA and the Commissioner's Rules require the utility to pay its avoided cost. CPN's avoided cost is not Idaho Power's avoided cost. Since it is a purchasing utility and not a generating utility, its avoided cost is its contract price, not the supplying utility's avoided cost. The Commissioner directed CPN to pay its supplying utility's avoided costs because CPN failed to file long-term avoided costs of its own. The filing was to be in effect until CPN filed its own avoided costs based on long term considerations. CPN has used this proceeding to file long-term avoided costs based on the notion that CPN plans to serve future loads with purchased power. CPN made a similar filing in UM 21. Snow Mountain participated in UM 21 as a full party and, in this proceeding, had ample opportunity to make a case concerning what CPN's avoided costs should be. Order No. 84-720 required all utilities to refile their avoided costs based on the Commissioner's findings in that proceeding. The Commissioner found that long-term avoided costs based on purchased power were appropriate for CPN.

Another issue raised in this proceeding concerned the computation of CPN's avoided costs. CPN presented evidence that the September 1983 avoided costs were not its true avoided costs. Instead, it argued that avoided costs based on a wholesale power purchase were its true avoided costs, and presented such avoided costs in this proceeding. In September 1984, CPN again filed such avoided costs with the Commissioner, this time pursuant to his Order 84-720. The Commissioner concludes that the

September 1984 avoided costs filed by CPN are the true and accurate avoided costs of CPN and consequently are completely congruent with Snow Mountain's election between the two available statutory options. These rates are now filed and approved by the Commissioner. While these September 1984 levelized rates are lower than the September 1983 levelized rates for the first 5 years, the total value on a 25-year basis is greater. Since September 1984 rates are based on current avoided cost estimates, the customer will not be burdened by using the current rate. In addition, Snow Mountain will obtain a higher rate over the life of the contract than the September 1983 rate.

Finally, the record indicates that Snow Mountain, pursuant to ORS 758.525(2), opted for payment to it of the "projected avoided costs calculated at the time the legal obligation to purchase the energy . . . is incurred." The Commissioner concludes that the legal obligation to purchase the power occurs at the time of publication of this dispositive order.

Since CPN is not a generating company but purchases most of its requirement through an all-requirements contract, this creates special and unique conditions. The Hines-John Day system is not directly connected with CPN's Baker-La Grande system. IPC provides electricity to both of those points directly. CPN may be unable to use the full 20 megawatts tendered by Snow Mountain without wheeling the excess through IPC's system. Therefore, the possible wheeling costs to utilize the power elsewhere must be borne by the cogenerator. In addition, costs for standby power, load leveling, and other services that are required as a result of Snow Mountain cogenerating plant providing the power rather than

purchasing under the all-requirements contract must be borne by Snow Mountain.

The Commissioner's disposition of this proceeding is pursuant to OAR 860-29-005(3). That rule provides:

> In the event of an impasse in negotiations between a public utility and a qualifying facility, either party may request a determination by the Commissioner of the matter at issue.

The attached form of contract is that "determination." It contains prices based on CPN's September 1984 avoided cost filing. Snow Mountain will be granted until the end of business day on December 24, 1984, in which to determine whether to sign such contract and file it with the Commissioner. If Snow Mountain determines not to sign and file the attached contract, CPN shall have no further obligation stemming from this proceeding or the Commissioner's disposition hereof. If on the other hand, Snow Mountain signs the contract attached to this order on or before December 24, 1984, then CPN shall be bound by all terms and conditions set out therein.

IT IS THEREFORE ORDERED that Snow Mountain Pine Company is granted until the close of business on December 24, 1984, in which to determine whether to sign such contract and file it with the Commissioner. If Snow Mountain Pine Company determines not to sign and file the attached contract, CP National Corporation shall have no further obligation stemming from this proceeding or the Commissioner's disposition hereof. If on the other hand, Snow Mountain signs the contract attached to this order on or before December 24, 1984, then CPN is bound by all terms and conditions set out therein.

Made, entered and effective Nov. 13, 1984.

(SEAL)

1h/0327A

/s/ Gene Maudlin
GENE MAUDLIN
Public Utility Commissioner

ORDER NO. 84-263
ENTERED APRIL 06 1984

BEFORE THE PUBLIC UTILITY COMMISSIONER
OF OREGON
UM 11

SNOW MOUNTAIN PINE COMPANY, Complainant, vs. CP NATIONAL CORPORATION AND IDAHO POWER COMPANY, Defendants.	)	ORDER

In October of 1983, Snow Mountain Pine Company (Snow Mountain) filed a complaint with the Oregon Public Utility Commissioner (Commissioner) against CP National Corporation (CPN) alleging that Snow Mountain had offered CPN 20 megawatts of cogenerated power and that CPN had refused to purchase the power as required by federal and Oregon law. Snow Mountain requested that the Commissioner issue an order compelling CPN to comply with the law and purchase the power. Snow Mountain also alleged that CPN had agreed to a rate that would be applicable if a purchase were

made and requested that the Commissioner establish the rate for purchase.

CPN filed an answer admitting that CPN had refused to buy Snow Mountain's power. CPN alleged that a purchase by CPN from Snow Mountain "would adversely [sic] overwhelm CPN's electric operation" and that CPN was willing to wheel Snow Mountain's power to another utility in reasonable proximity to Snow Mountain's facility. CPN requested that the Commissioner apply to the Federal Energy Regulatory Commission (FERC) under 18 CFR § 292.403 for a waiver of the federal law requiring CPN to purchase.

On January 16, 1984, a prehearing conference was held and the following issues were determined as threshold issues prior to determination of other issues in the case:

1. Is CPN obligated to purchase up to 20 megawatts of power from Snow Mountain?

2. Is CPN's avoided cost equal to its purchase power cost from Idaho Power and, if not, what is its true avoided cost?

3. Is CPN estopped from contending that the rate that it will pay for Snow Mountain's power is equal to its purchase power cost from Idaho Power?

4. Is Snow Mountain entitled to a "grandfathered rate" from CPN?

On February 13 and 14, 1984, a hearing was held limited to the first issue. At the close of the hearing, Hearings Officer Leon Hagen concluded that CPN was obligated to purchase the power from Snow Mountain.

CPN then requested that the issue be sent to the Commissioner for decision. Hearings Officer Hagen directed that the parties file briefs for presentation of the matter to the Commissioner.

The following appearances were entered at the hearing:

For Snow Mountain:

Don A. Haagensen, Attorney
Portland, Oregon and

Paul E. Levy, Attorney
Boise, Idaho

For CPN:

John Wiley Gould, Attorney, and
Marvin D. Fjordbeck, Attorney
Portland, Oregon

For Idaho Power:

Gene C. Rose, Attorney
Ontario, Oregon

Barton L. Kline, Attorney, and
Larry D. Ripley, Attorney
Boise, Idaho

For the Commissioner's Staff:

Thomas Twist
Assistant Attorney General
Salem, Oregon

CPN requested leave for oral argument which is denied.

Questions Presented

1. Is CPN required by either federal law or Oregon law to purchase the 20 megawatts of power offered by

Snow Mountain to CPN from Snow Mountain's qualifying cogeneration facility to be constructed in CPN's service territory?

2. If CPN has a legal obligation to purchase such power under federal or Oregon law, is there a legal procedure by which CPN's obligation may be waived?

3. If CPN had legal obligation to purchase and there is a procedure for waiver of CPN's obligation, has CPN met the requirements for such a waiver?

The Commissioner answers question one affirmative and need not decide questions two or three because until CPN's avoided cost to be paid Snow Mountain is determined, the Commissioner cannot conclude if CPN customers will be harmed or otherwise adversely affected.

Section 210 of PURPA (16 USC 8242-3) requires electric utilities to purchase electric energy from cogeneration and small power producers. The rates for such purchase "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." Oregon adopted similar statutes found in ORS 758.500 *et seq.*

Section 210 of PURPA required the Federal Energy Regulatory Commission (FERC) to promulgate rules and requires the Commissioner to implement the promulgated FERC rules for investor-owned electric utilities in Oregon. These rules appear at Part 292 of FERC rules (18 CFR Part 292). Oregon law requires the Commissioner to administer Oregon law to Oregon investor-owned electric utilities (utility). The Commissioner promulgated rules to implement these provisions as OAR 860-29-001 *et seq.*

The statutes and OAR 860-29-030 clearly provide that an investor-owned electric utility is obligated to purchase electricity from a cogenerator meeting the terms of the rule.

CPN argues that it should be excused from purchase because CPN would be required to purchase energy reserves, add additional transmission lines or provide for wheeling, provide for load control, and capacity changes would cause rates to increase. These are all factors that can be considered in calculating the cost to CPN of taking from Snow Mountain.

The rules require the utility to purchase at rates that are just and reasonable to the electric consumer of the utility and in the public interest.

As the Commissioner stated in Order No. 81-319 in adopting the rules:

> The Commissioner's basic philosophy in establishing these rules is that utilities should pay the full avoided costs for energy and capacity obtained from qualifying facilities. Paying more than the full avoided costs for the energy and capacity increases utility costs and rates over what they would have been had no purchases from qualifying facilities been arranged. Payments which are, on a total present value basis over the life of the project, beyond full avoided costs will be disallowed in setting revenue requirements in general rate cases unless prior specific approval has been received from the Commissioner.

IT IS THEREFORE ORDERED that the Commissioner finds that CP National Company, based upon this record,

is required to purchase the 20 megawatts of power offered by Snow Mountain Pine Company.

IT IS FURTHER ORDERED that further hearing be held and that a conference be held on April 13, 1984, at 10:00 a.m. in Room D, Labor & Industries Building, Salem, Oregon, unless otherwise directed by the Hearings Officer.

Made, entered, and effective April 6, 1984.

/s/ Gene Maudlin
GENE MAUDLIN
Public Utility Commissioner

SEAL

APPENDIX C

EXHIBIT SM22

CP
NATIONAL

General Offices
1355 Willow Way/Concord, CA 94520
(415) 680-7700
P.O. Box 4032 Concord, CA 94524

February 14, 1983

Mr. John J. Lobdell
Public Utility Commissioner
Of Oregon
Labor & Industries Building
Salem, Oregon 97310

Re: Avoided Cost Filing

Dear Commissioner Lobdell:

Responding to your letter dated February 8, 1983 CP National will modify its avoided cost information currently on file with your office. The change will parallel that of our supplier Idaho Power Company whose avoided costs have been applicable for CP National in Oregon pursuant to instructions contained in your letter to Rick Jarrett dated August 26, 1982.

We expect to receive Idaho Power Company's revised avoided cost information concurrent with their filing.

Sincerely,

/s/ J. P. Paris
J. P. Paris
Vice President
Northwest Region

JPP:ja

cc: J. Bruce
Idaho Power Co.

EXHIBIT SM23

CP
NATIONAL

Northwest Regional Office
1617 Barnett RD./P.O. Box 1709/Medford, OR 97501
(503) 776-0763

June 24, 1983

Mr. John J. Lobdell
Public Utility Commissioner
of Oregon
Labor & Industries Building
Salem, Oregon 97310

Re: Avoided Cost Filing

Dear Commissioner Lobdell:

In accordance with instructions to file new avoided costs by June 30, 1983 please be advised that CP National will continue to parallel the avoided cost information filed by our supplier Idaho Power Company. This procedure is pursuant to instructions contained in your letter to Mr. Jarrett dated August 26, 1982.

We expect to receive Idaho Power Company's revised avoided cost information concurrent with their filing.

Sincerely yours,

/s/ J. P. Paris
J. P. Paris
Vice President –
Northwest Region

JPP:plk

cc: James Bruce
Idaho Power Co.

PUBLIC UTILITY COMMISSIONER OF OREGON

LABOR & INDUSTRIES BUILDING, SALEM OREGON 97310 PHONE (503) 378-6611

August 26, 1982

Rick Jarrett
CP National Corp
PO Box 4032
Concord CA 94524

I am writing this letter to confirm our understanding with respect to CP National's avoided cost-based rates for cogeneration and small power production. As you know, the Public Utility Regulatory Policies Act of 1978 and ORS Chapter 758 require the Oregon Public Utility Commissioner to set rates for purchases from cogeneration and small power production facilities. Effective on October 29, 1981, OAR 860-29-080 required that CP National file its avoided costs on January 1, 1982.

It has been CP National's position that its avoided cost is the price it pays to Idaho Power Company for purchased

power. At the present time, this price amounts to roughly 22 mills per kilowatt hour for firm energy and capacity.

A pricing scheme based on only the cost of purchased power neglects the problem of acquiring resources for long-term use. Idaho Power have given notice that it does not intend to provide power to CP National beyond June 30, 1985. As yet, CP National has not formulated a long-term power supply plan.

In addition, avoided costs based on short-term considerations are not a sufficient incentive to potential developers of cogeneration and small power production facilities. Rates based on long-term plans are necessary to encourage private developers to bring these sources of power on line.

Because CP National has not yet developed such a long-term plan upon which to base long-term avoided costs, its prices are inadequate. To remedy this situation, until further notice CP National should use the enclosed avoided costs filed by Idaho Power Company as the basis for its long-term avoided costs for facilities with a generating design capacity of greater than 100 kw. Please also note the attachment that exhibits rates when fixed operation and maintenance expenses are not levelized. The long-range power supply plan of CP National's supplier is the best available estimate of CP National's own long-range costs.

If CP National adopts a long-range plan, we will be willing to discuss a modification to your long-term avoided costs.

If you have any questions, please contact Barbara Combs at 378-6190.

/s/ John J. Lobdell
John J. Lobdell
Commissioner

sms/0484S-1

Attachment

cc: Barbara Combs

Attachment
Idaho Power Avoided Costs
Effect of Levelizing O & M Expenses
1982 $

1 Contract Term (years)	2 Carrying Charge mills/kwh	3 Fuel Plus Variable O & M	4 Levelized Fixed O & M	5 Nonlevelized Fixed O & M	6 Total Price: O & M Levelized (2+3+4)	7 Total Price: O & M Not Levelized (2+3+5)
5	23.82	22.2	2.20	1.98	48.22	48.00
10	26.55	22.2	2.45	1.98	51.20	50.73
15	28.95	22.2	2.67	1.98	53.82	53.13
20	30.94	22.2	2.85	1.98	55.99	55.12
25	32.54	22.2	3.00	1.98	57.74	56.72
30	33.78	22.2	3.12	1.98	59.10	57.96
35	34.71	22.2	3.20	1.98	60.11	58.89
	Variable component (mills/kwh):			22.20	24.18	

(2)

No. 90-1322

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

SNOW MOUNTAIN PINE COMPANY,

Petitioner,

v.

THE PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON,

Respondent,

and

CP NATIONAL CORPORATION, a California corporation,

Respondent,

and

OREGON TRAIL ELECTRIC CONSUMERS COOPERATIVE, INC.,

Intervenor/Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oregon

JOINT BRIEF IN OPPOSITION

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Counsel for Respondent, Oregon Trail Electric Consumers Cooperative, Inc.

QUESTIONS PRESENTED

The questions presented by Snow Mountain Pine Company's Petition are:

1. Whether it is proper to seek review of a 1987 decision of the Oregon Court of Appeals *(Snow Mountain I)* by a Petition for a Writ of Certiorari from a 1990 order of the Oregon Supreme Court denying review of a 1990 decision of the Oregon Court of Appeals *(Snow Mountain II)* adhering to its 1987 decision in *Snow Mountain I* and ruling that the Oregon Public Utility Commission complied with its instructions on remand?;[1]

2. Whether it is proper to seek a Writ of Certiorari based upon alleged violations of provisions of the U.S.

---

[1] Snow Mountain's Petition does not comply with the Rule 14.1(k)(i) requirement that the 1990 decision of the Oregon Court of Appeals in *Snow Mountain II* be set forth in the Appendix to the Petition. The full opinion reads:

> "PER CURIAM
>
> "Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong. We adhere to our opinion and conclude that PUC complied with our instructions on remand.
>
> "Affirmed." (102 Or App at 689, 795 P2d at 611)

QUESTIONS PRESENTED – Continued

Constitution when petitioner raised no such constitutional issues in the Oregon Appellate Court proceedings sought to be reviewed?; and

3. Whether there is any reason to grant the requested Writ of Certiorari when the claim to excessive cogeneration purchase rates is patently inconsistent with the unambiguous "avoided cost" price provisions of PURPA, the Federal Energy Regulatory Commission's PURPA regulations, Oregon's PURPA statutes and the Oregon Public Utility Commission's PURPA rules?

RULE 29.1 STATEMENT AND LISTING OF PARTIES

For clarification, we wish to supplement Petitioner's statement, as follows:

The correct designation of the first listed Respondent is the Public Utility Commission of the State of Oregon ("OPUC"). Under PURPA and the Federal Energy Regulatory Commission's ("FERC") PURPA regulations it is charged with administering PURPA in Oregon.

Oregon Trail Electric Consumers Cooperative, Inc., ("Oregon Trail") is an Oregon non-profit corporation which acquired all of CP National's ("CPN") Oregon electric utility properties and operations in 1988 and is, thus, the successor in interest of CPN's rights and obligations. Oregon Trail was not a party to the appeal in *Snow Mountain I*.

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SUPPLEMENTAL STATEMENT OF THE FACTS

We submit the following Supplemental Statement of Facts to clarify the issue which was presented and resolved in the Snow Mountain litigation.

A. The Price Dispute And Its Source

Under the Public Utility Regulatory Policies Act ("PURPA") Snow Mountain was entitled to generate and sell electric power to CPN. "[T]he obligation to purchase power," as noted in *Snow Mountain I*, "is imposed by law on a utility; it is not voluntarily assumed." (Pet App at B46, 84 Or App at 599, 734 P2d at 1370)

Snow Mountain tendered PURPA power to CPN on July 6, 1983, but demanded payment of rates based upon Idaho Power Company's avoided costs, not CPN's. As stated in *Snow Mountain I* (Pet App, pp B44-45), because CPN would not agree to pay the high avoided costs of Idaho Power Company unless the OPUC would allow CPN to pass the resulting high rates through to its customers, Snow Mountain filed a complaint with the OPUC under a Commission rule which authorized the Commissioner to set the proper price. (Pet App B45-47)

Under PURPA the power purchase rate must be " * * * just and reasonable to [ratepayers] and in the public interest" [16 USC § 824a-3(b)], and this result is ensured by a provision limiting the rate to no more than the utility's "incremental cost of alternative electric energy" [16 USC § 824a-3(d)], or the cost that the utility would otherwise incur for the same power. This non-subsidy principle was clearly explained in *Greensboro*

Lumber Co. v. Georgia Power Co., 643 F Supp 1345 (ND Ga 1986), *aff'd*, 844 F2d 1538 (11th Cir 1988), as follows:

> " * * * Congress expressly provided in PURPA that utilities should not pay qualifying facilities such as Greensboro a price in excess of the utility's 'incremental cost . . . of alternative electric energy.' 16 U.S.C. § 824a-3(b). This provision was enacted because PURPA was 'not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers.' (citation omitted) The congressional purpose in limiting the price to qualifying facilities was to ensure that PURPA did not become a utility-funded welfare program for qualifying facilities, since such 'funding' would essentially come from the pockets of electric consumers. The 'full avoided cost' (the term used in FERC's rules) or 'incremental cost' (the term used in PURPA) ceiling ensures that payments to qualifying facilities will not increase a utility's overall costs. In fact, the rates charged to consumers will remain the same 'for, by hypothesis, the utilities would have incurred the same costs had they generated the energy themselves or purchased it from other sources instead of purchasing from a qualifying facility.' *American Paper Institute*, 461 U.S. at 415 n. 9, 103 S.Ct. at 1929 n. 9 (1983)." (643 F Supp at 1369, n 30)

The price dispute stemmed from the law's definition of "avoided costs," and the fact that CPN was a non-generating utility which purchased all of its electric power needs wholesale from Idaho Power Company at rates set by the FERC. Under PURPA [16 USC § 824a-3(d)], the FERC's PURPA regulations [18 CFR § 292.101(b)(6)], Or Rev Stat 758.500(5) and the OPUC's PURPA rules [Or Admin Rule 860-29-010(1)],

> " 'Avoided cost' means the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself *or purchase from another source* but for the purchase from a cogeneration facility or a small power production facility." (emphasis added)

Snow Mountain contended that CPN must pay the "avoided costs" of its supplier, Idaho Power Company ("IPCo"), as shown by schedules of estimated avoided costs filed by IPCo with the OPUC in August, 1982 or February, 1983. CPN, in contrast, claimed that its actual "avoided costs" were the FERC-set wholesale rates it paid IPCo under the "purchase from another source" language contained in the law's "avoided cost" definition. The dispute was significant because Snow Mountain's price theory, had it prevailed, would have required CPN and its ratepayers to subsidize Snow Mountain's cogeneration project by paying several times as much for the electric power to be acquired from Snow Mountain than they otherwise would.

B. The 1983-1984 OPUC Proceedings And Snow Mountain's Unsuccessful FERC Complaint

CPN's position in the OPUC proceeding initiated by Snow Mountain (docketed as UM 11) was stated by the first affirmative defense of its Answer, as follows:

> "CPN is a non-generating utility, buying virtually all of its power from Idaho Power Company (IPC) pursuant to wholesale tariffs subject to approval by the Federal Energy Regulatory Commission (FERC). As such, CPN's avoided cost is equal to its purchased power costs from IPC and is not equal to IPC's avoided cost."

In July, 1984, while the OPUC proceeding initiated by Snow Mountain was still pending, Snow Mountain attempted to get the FERC to intercede and give it rates based upon IPCo's avoided cost by filing a complaint with the FERC against CPN and IPCo. On March 19, 1985 the FERC dismissed Snow Mountain's Complaint on motions of the defendants (in which the OPUC joined after intervening), stating:

> "Snow Mountain's complaint will be dismissed. As the Commission has previously noted, complaints regarding an alleged refusal to purchase power from a qualifying facility and the rates for such purchases are matters properly brought in a State forum. Also, as noted above, the Oregon Commissioner has concluded his proceedings considering these issues by establishing avoided cost rates for CPN and requiring it to purchase from Snow Mountain. If Snow Mountain is dissatisfied with the Oregon Commissioner's determinations, or if CPN should fail to abide by them, then Snow Mountain should pursue that matter in a State forum of competent jurisdiction. Snow Mountain's other requests for declaratory relief have no basis." (30 FERC ¶ 61,293, p 61,589 (March 19, 1985))

In November of 1984, the OPUC entered Order No. 84-895 (Pet App, p B58), which sustained CPN's position that the purchase price for Snow Mountain's power must be based upon CPN's avoidable wholesale power purchase costs, not upon the higher avoided costs of its supplier, Idaho Power Company:

> "PURPA and the Commissioner's Rules require the utility to pay its avoided cost. CPN's avoided cost is not Idaho Power's avoided cost.

> Since it is a purchasing utility and not a generating utility, its avoided cost is its contract price [with its primary power supplier, Idaho Power Company], not the supplying utility's avoided cost." (Pet App at B64)

Attached to Order No. 84-895 was a "Power Sales Agreement" which contained (pp 4-5) the power purchase rates set by the OPUC. Snow Mountain did not "sign and file the attached contract," as provided, but sued the OPUC in Multnomah County Circuit Court (Case No. A8501-00567) under Or Rev Stat 756.580.

C. Snow Mountain's First Multnomah County Circuit Court Suit And The Decision In Snow Mountain I

In the 1985 Multnomah County Circuit Court suit the trial court reversed the OPUC on two points pertinent here (Pet App, p B50). First, the court ruled that the OPUC should have determined the purchase rate as of July 6, 1983, not as of November 13, 1984 (the date Order No. 84-895 was entered). Second, the court ruled that the price should have been determined from the avoided cost schedule filed by IPCo in February, 1983, rather than from CPN's actual avoided costs. The OPUC and CPN appealed, and the Oregon Court of Appeals issued its opinion [*Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987), (Pet App, pp B33-49, B32)] on April 8, 1987, ruling that:

> "Here, CP must pay for the power at a rate projected from its [not IPCo's] July, 1983, actual 'avoided costs,' "

and ordering:

> "The part of the circuit court judgment saying that the purchase price is to be determined from the [IPCo] 'avoided cost' schedule on file July 6, 1983, is reversed; otherwise the judgment is affirmed; the commissioner's order is reversed and remanded for a determination of CP National's actual 'avoided costs' as of July 6, 1983, projected over the life of the obligation * * * ." (Pet App at B49, 84 Or App at 601, 734 P2d at 1372)

Snow Mountain promptly filed a Petition for Review which asserted (Rec 13, Exhibit E, p 22)[2] that the case had been "incorrectly decided" by the Oregon Court of Appeals, and asked that the Oregon Supreme Court " * * * grant review, provide a correct statement of the law, and hold that no remand is necessary because the circuit court's judgment [which the Oregon Court of Appeals had expressly reversed] is correct." Acting under ORAP 10.10(1) the Oregon Court of Appeals denied reconsideration on June 12, 1987 (Pet App, p B32), and the Oregon Supreme Court denied review on July 8, 1987. (Pet App, p B31)

Snow Mountain's attempt to reverse, or change, the 1987 decision in *Snow Mountain I* did not stop there. On July 30, 1987, Snow Mountain moved the Oregon Court of Appeals to alter its remand instructions (Rec 13, Exhibit K) so as to provide for a " * * * remand to Multnomah County Circuit Court for determination of whether CP National's actual avoided costs as of July 6, 1983, projected over the life of the obligation, can be determined

---

[2] The citations are to the record in the Oregon Court of Appeals in *Snow Mountain II*.

on the present record or whether a remand to the Public Utility Commission is necessary for that purpose." The motion was denied. (Pet App, p B30)

In November, 1987, in another Oregon circuit court suit against CPN which was recently dismissed and is now on appeal (CA No. A63075), Snow Mountain gave the trial court this account of the ultimate disposition of the *Snow Mountain I* appeal:

> "There were two principal issues to be decided on appeal in *Snow Mountain Pine Company v. Gene Maudlin and CP National Corporation*. First, the time at which CP National's obligation to purchase arose and, second, the price to be inserted into the 20 year contract the Commissioner created compelling CPN to purchase. The Court of Appeals' decision affirmed the finding of Judge Snouffer that CPN was required to purchase when Snow Mountain first offered its power on July 6, 1983. *On the issue of price, however, the Court of Appeals declined to order the Public Utility Commission to insert directly into the contract the February, 1983 avoided cost schedule which Judge Snouffer had ordered to be used in the contract*. The Court of Appeals remanded the issue of price to the Commission." (emphasis added)

This 1987 account is significant because Snow Mountain did not then petition the U.S. Supreme Court for a Writ of Certiorari, but chose instead to try to undermine and reverse the Oregon Court of Appeals' decision in the OPUC remand proceedings which followed.

D. The OPUC Remand Proceeding, Snow Mountain's Second FERC Petition And Second Multnomah County Circuit Court Suit

After the OPUC reacquired jurisdiction on remand, Snow Mountain filed a motion to reinstate that portion of the trial court Judgment which the Oregon Court of Appeals had reversed in *Snow Mountain I*. That motion was denied by OPUC Order No. 88-153 for these reasons:

> "In a nutshell, Snow Mountain wants this Commission to declare that the CPN avoided cost schedule on file on February, 1983 was CPN's actual avoided cost on July 6, 1983, even though the filing was actually Idaho Power's avoided cost. It was this February, 1983 schedule that the Circuit Court adopted. The Court of Appeals specifically reversed the Circuit Court on this point and remanded the matter to the Commission to determine CPN's 'actual "avoided cost" as of July 6, 1983, projected over the life of the obligation;. . . .'
>
> "Granting Snow Mountain's motion would ignore the Court of Appeals opinion and its remand, and would be contrary to the court's determination that the Circuit Court decision simply to use the 'avoided cost' schedule on file was error. * * * ." (Pet App, pp B27-28)

Snow Mountain next filed a Petition for Reconsideration of the order denying its motions, which the OPUC denied by Order No. 88-527 (Pet App, p B23) on May 12, 1988. On May 2, 1988, before its reconsideration petition had been denied, Snow Mountain filed a second Petition with the FERC (Rec 36, Exhibit B), which asked the federal Commission to intercede and force the OPUC to apply the law Snow Mountain's way. However, Snow

Mountain shortly changed its mind and, on May 20, 1988, withdrew its FERC Petition, giving these reasons:

> "Proceedings involving these issues are continuing in front of the Oregon Public Utility Commission. Some of the conditions which suggested the filing of the petition have changed. These include the timing of the process and substantive decisional developments. Snow Mountain has determined that it is appropriate at this time to pursue its rights through the Oregon Public Utility Commission. The withdrawal of Snow Mountain's petition will advance the interests of economy, efficiency and speedy resolution of the issues." (Rec 48, Exhibit A)

In less than three weeks, midstream in the OPUC remand proceeding, Snow Mountain filed a second suit against the OPUC and CPN in Multnomah County Circuit Court. At a hearing held on October 6, 1988, the trial court granted the OPUC's and CPN's motions to dismiss, and a Judgment dismissing Snow Mountain's case was entered on October 24, 1988. On November 15, 1988 Snow Mountain appealed again to the Oregon Court of Appeals (CA No. A50333). That appeal remained pending for some time on Snow Mountain's motion for an indefinite stay of proceedings, but was ultimately dismissed.

E. The OPUC's Final Remand Order Setting The Purchase Price For Snow Mountain's Power

On December 5, 1988 the OPUC entered final remand Order No. 88-1419 (Pet App, p B8), setting the rate for purchase of Snow Mountain's power in accordance with the Court of Appeals' mandate in *Snow Mountain I*. The

Order (Pet App, p B22) gave Snow Mountain until December 30, 1988 to sign the contract and bind CPN by its terms. Snow Mountain did not sign the contract, but on December 15, 1988 filed its third Multnomah County Circuit Court suit against the OPUC and CPN claiming that Order No. 88-1419 was unlawful, unreasonable and contrary to the decision in *Snow Mountain I*.[3]

F. Snow Mountain's Third Multnomah County Circuit Court Suit, And The Trial Court's Judgment Affirming The OPUC's Final Order on Remand

Snow Mountain's initial complaint sought to relitigate all issues which had been addressed in Snow Mountain's first appeal to Multnomah County Circuit Court which culminated in the Oregon Court of Appeals' decision in *Snow Mountain I*. On Joint Motion of the OPUC and CPN, the bulk of Snow Mountain's allegations were stricken, and Snow Mountain filed an Amended Complaint. Only Count One of that complaint was involved on the appeal in *Snow Mountain II*. [Snow Mountain did not challenge the OPUC's determination of CPN's actual avoided costs.]

On July 31, 1989, the trial court issued a Letter Opinion (Pet App, p B3) ruling that, "Because there is substantial evidence in the record to support the commission's

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[3] In February, 1989 Snow Mountain filed an identical suit in Marion County Circuit Court which was transferred to Multnomah County Circuit Court (Case No. A8907-03971) on motion of CPN and the OPUC, and then consolidated by order dated August 25, 1989 with Multnomah County Circuit Court case No. A8812-06809 filed in December, 1988.

findings of fact, and because its conclusions are reasonable and lawful, Order 88-1419 will be affirmed" (Pet App, p B7). Agreeing with the Commission that, " * * * CP's actual avoided cost as of July 6, 1983, was the wholesale rate which the utility paid to Idaho Power and *not* Idaho Power's avoided costs as reflected in the Feb., 1983 schedule" (Pet App, p B5); (emphasis in original), the trial court rejected Snow Mountain's position, using these words:

> "Snow Mountain says that the Feb., 1983, schedule is not only the 'starting point' but also the ending point; that the schedule is both Alpha and Omega. The argument is that the Court of Appeals mandated only that the schedule be modified or adjusted by the regulatory factors of OAR 860-29-040(6); that such adjustment had already occurred, unbeknownst to this court or the Court of Appeals; and that therefore the schedule should be reinserted into the contract. But the Court of Appeals ordered otherwise. Snow Mountain's Herculean efforts to persuade the PUC to reinstate the Feb., 1983, schedule into the contract were properly rejected. They likewise are rejected by this court." (Pet App, p B6)

After Judgment was entered against it, Snow Mountain appealed to the Oregon Court of Appeals. Because the Appendix to Snow Mountain's Petition (Pet App, pp B2-3) does not report the decision in *Snow Mountain II* as required by Supreme Court Rule 14.1(k)(i), we repeat the full text of that opinion here:

> "PER CURIAM
>
> "Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on

> remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong. We adhere to our opinion and conclude that PUC complied with our instructions on remand.
>
> "Affirmed." (102 Or App at 689, 795 P2d at 611)

Snow Mountain again petitioned the Oregon Supreme Court to review and reverse the Oregon Court of Appeals' decision, but the Oregon Supreme Court denied review on November 20, 1990 (Pet App, p B1), and the Appellate Judgment was issued by the Oregon Court of Appeals on January 2, 1991. Snow Mountain's Petition for a Writ of Certiorari to the Oregon Supreme Court followed.

REASONS FOR DENYING THE WRIT

It is not clear from Snow Mountain's Petition what Snow Mountain wants this court to do, or why. We briefly address three reasons why we believe the Petition should be denied.

A. Snow Mountain's Petition Seeks Review Of A 1987 Decision And Is, Thus, Untimely.

As just demonstrated, the 1990 decision of the Oregon Court of Appeals in *Snow Mountain II* is a one-paragraph *per curiam* decision which merely adheres to

the court's 1987 decision in *Snow Mountain I*, and concludes that the OPUC complied with its remand instructions. *Snow Mountain I*, rendered in 1987, is the decision on the merits with which Snow Mountain disagrees. If Snow Mountain was aggrieved, as it claims, it should have filed a Petition for a Writ of Certiorari after the 1987 decision in *Snow Mountain I*, following the Oregon Supreme Court's denial of its Petition for Review (Pet App, p B31) on July 8, 1987.

Moreover, the sole issue decided in *Snow Mountain II* that was not fully addressed and resolved in *Snow Mountain I* was the determination that the OPUC had in fact complied with the court's remand instructions in *Snow Mountain I*. This determination provides no "federal ground" for requesting, or granting, a Writ of Certiorari. *Herb v. Pitcairn*, 324 US 117, 125-26 (1945)

B. Snow Mountain Did Not Raise Any Federal Constitutional Issues In The Oregon Appellate Courts.

Snow Mountain's Petition cites Article VI, Clause 2 and Amendments V and XIV to the U.S. Constitution (Pet App, pp A1-2) and obliquely suggests that the results of its litigative efforts, culminating in the decision in *Snow Mountain II*, somehow violate its (or Raymond Feichtmeir's) rights under the U.S. Constitution.

Snow Mountain did not raise any federal constitutional issue, or even cite a provision of the U.S. Constitution, in *Snow Mountain I* or *Snow Mountain II*. To demonstrate this, we have reproduced in the Appendix hereto the Index of Authorities from Snow Mountain's briefs in *Snow Mountain I* and *Snow Mountain II*. Issues

not raised in the state appellate court do not provide a basis for issuance of a Writ of Certiorari:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)." *Webb v. Webb*, 451 US 493, 496-97 (1981)

See also, McGoldrick v. Compagnie Gen. Transatlantique, 309 US 430, 434-35 (1940); *Illinois v. Gates*, 462 US 213 (1983); and *Cardinale v. Louisiana*, 394 US 437, 400-01 (1969).

C. Snow Mountain's Price Theory Is Incompatible With The Unambiguous Price Provisions Of PURPA.

A Petition for Certiorari should not be seriously considered when the petitioner's claim is patently invalid.

As demonstrated above, the rate for purchase of cogenerated power under PURPA is anchored to the "avoided cost" of the purchasing utility (here CPN) and,

> " 'Avoided cost' means the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself *or purchase from another source* but for the purchase from a cogeneration facility or a small power production facility." (emphasis added)

As CPN was a non-generating utility its "avoided cost" was the cost of purchasing power wholesale from Idaho Power Company at rates set by the FERC, not Idaho Power Company's or some other utility's "avoided cost." Snow Mountain's contrary position is thus untenable on

its face, as the OPUC and the Oregon trial and Oregon appellate courts have held.

It is also not clear why Snow Mountain refers to and then seemingly criticizes the *Afton*[4] decisions at pages 12-13 of its Petition. None of the *Afton* cases involved the attempt of a cogenerator to obtain rates based upon the "avoided costs" of a utility other than the buying utility, as Snow Mountain unsuccessfully sought to do in the proceedings below. Indeed, to our knowledge, no court – state or federal – except for the Oregon courts, has ever considered or passed upon Snow Mountain's curious position.

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[4] *Afton Energy, Inc., v. Idaho Power Company,* 107 Idaho 781, 693 P2d 427 (1984); *Idaho Power Company v. Idaho Public Utilities Commission,* 107 Idaho 1122, 695 P2d 1261 (1985); *Afton Energy, Inc. v. Idaho Power Company,* 111 Idaho 925, 729 P2d 400 (1986); *Afton Energy, Inc. v. Idaho Power Company,* 114 Idaho 852, 761 P2d 1204 (1988).

CONCLUSION

Snow Mountain's 1991 Petition for a Writ of Certiorari seeking review of a 1987 decision of the Oregon Court of Appeals is untimely, groundless, and should not have been filed. It should now be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 90-1322

In The

Supreme Court of the United States

October Term, 1990

SNOW MOUNTAIN PINE COMPANY,

Petitioner,

-against-

THE PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON

Respondents.

and

C.P. NATIONAL CORPORATION, a California corporation

Respondent.

and

OREGON TRAIL ELECTRIC CONSUMER'S COOPERATIVE, INC.,

Intervenor/Respondent

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REPLY TO OPPOSITION TO GRANT OF CERTIORARI

The State of Oregon Does Not Oppose Review.

The State of Oregon has been seeking for seven years to determine the meaning of federal law in this case. At times during the Snow Mountain cases, the counsel for the Oregon PUC have supported the lawfulness and accuracy of the 1983 avoided costs orders sought to be enforced by Snow Mountain, while the Attorney General's Office has requested that the Oregon court's ignore those orders and rates. It is a support of the Petition For Writ of Certiorari that its Attorney General has decided not to oppose certiorari with a filing.

C.P. National Corporation and Oregon Trail Electric Consumers' Cooperative, Inc. alone have filed a Joint Brief in opposition to the Petition for Writ of Certiorari.[1]

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[1] C.P. National Corporation's Rule 29.1 Statement fails to properly disclose that CPN has been merged into a subsidiary of Alltel, Inc., a corporation of the state of Delaware which owns utility subsidiaries in numerous states. Those subsidiaries are not named for the court as required. Alltel shares are listed for trading on the New York Stock Exchange.

Oregon Trail Electric Consumer's Cooperative, Inc., purchased CPN's utility assets in Oregon during the pendency of this case and agreed to perform the obligations of CPN to Snow Mountain.

Review is Sought Timely:

Federal Appellate Jurisdiction Was Created By The Decision In *Snow Mountain II* not Snow Mountain I

The Reply Brief contains numerous factual errors which can serve only to confuse the Court and its clerks.[2] However, the basic proposition of the opposition is the assertion inter alia that Snow Mountain should have brought its appeal to this court after the first decision of the Oregon Court of Appeals against Snow Mountain (and the subsequent refusal by that Court and the Oregon Supreme Court to grant review or reconsideration).[3]

This is incorrect. No appeal could have been brought at that time. Appeal became possible and proper only after the Oregon P.U.C. acted upon the remand from these decisions and proceeded to ignore entirely the lawfully established avoided costs set in 1983.[4]

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[2] An erroneous reference is made in the joint brief at page 9 to a second case filed in Multnomah County in the same action. Such case was filed in Marion County by reason of the parties' agreement that jurisdictional issues required the filing as a protective measure. This complaint was not pursued after the jurisdictional issue was resolved. The same was true of the FERC complaint which confirmed that no jurisdiction existed in any federal forum for resolution of the PURPA issues.

[3] See, page 6 of Joint Brief in Opposition.

[4] Since these avoided costs were established lawfully and were adopted and followed by CPN and the Oregon P.U.C., they were, as a matter of law, "actual" avoided costs.

The first decision of the Oregon Court of Appeals contained ambiguous language which stated both that: (i) Snow Mountain be afforded a right under federal law only to "actual avoided costs" existing on July 6, 1983; and (ii) language that federal law required that the 1983 posted avoided costs rates be used "as a starting point" for the determination of "actual avoided costs" vis a vis the Snow Mountain facility by considering price adjusting factors, set forth in federal law, which adjust the generic prices for "project specific" characteristics.[5] Remand was ordered to set "actual avoided costs." Nothing in this statement of federal law was erroneous. No harm had yet come to Snow Mountain by reason of the decision of the Oregon Court of Appeals in *Snow Mountain I. That* decision affirmed the Circuit Court's reversal of the Order 84-895 being contested by Snow Mountain.[6]

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[5] These are such matters as whether the project is on line during system emergencies, the line losses avoided on the system by reason of the placement of the new generation facility and the like.

[6] The Per Curiam decision cited at page 11 of the Joint Brief states: Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or. App 590, 734 P.2d, *rev den* 303 Or. 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong [contrary to federal law]. We adhere to our opinion and conclude that the PUC complied with our instructions on remand.

"Affirmed." (102 Or. App at 689, 795 P.2d at 611).

Snow Mountain adopts the citation as part of the Petition.

Snow Mountain did previously ask the Court of Appeals and the Oregon Supreme Court to clarify its remand order. Snow Mountain agreed that the remand Order required use of the 1983 rates as a starting point, but asked that the adjustments not be made again because they had been made already in the contract provisions created by the Order 84-895.[7] These Courts declined to grant review. However, under Oregon law, this denial of review is not a decision on the merits. In fact, under Oregon law, it is error of law, to consider these decisions to be decisions on the merits. In *1000 Friends of Oregon v. County Board of Commissioners, Benton County*, 284 Or. App. 41, 46 and 47, 584 P.2d 1371, 1373 and 1374 (1978) (Justice Linde), the Oregon Supreme Court found that a denial of review is not a ruling on the merits, citing *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 70 S.Ct. 252 (1950) (J. Frankfurter). As such, no appeal could yet be brought by Snow Mountain until after the remand which followed denial of review.

C.P. National and Oregon Trail in their Joint Brief pretend that the decisions not to grant review in Snow Mountain I by the Supreme Court were on the merits and that such triggered the time to appeal to this court.

The simple truth is that the Oregon P.U.C. could have followed the decision in *Snow Mountain I* and started with the 1983 avoided costs. It could have complied with the remand order and created **actual avoided costs for Snow**

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[7] PURPA contracts provide for lower payments if power provided is not firm or peak power; and provide for payment during system emergencies; provided a payment or credit for line losses and reflect the factors set forth in federal law.

Mountain by amending the contract and otherwise making adjustments to the 1983 price schedules as allowed by federal law for project specific factors. Had the Oregon P.U.C. done so, there would be no flagrant violation of the federal law or program. Certainly, no appeal could have been taken.

This appeal is required because the Oregon P.U.C. took the case on remand in 1988 and established "actual" avoided costs for this project as of July 1983 which were not based in any way upon the lawful avoided costs posted by the Oregon P.U.C. in 1983 for use by Snow Mountain. No consideration was given on remand to any factors for adjusting prices. The Oregon P.U.C. simply adopted new philosophies and methodologies regarding how to estimate C.P. National future power costs, and it simply ignored the previous avoided costs orders adopted pursuant to federal law.

It was this action which aggrieved Snow Mountain. It is from the affirmance of these Orders that appeal is taken to this Court.

CP National Corporation's Brief Is Inaccurate. Its Arguments Support The Grant of Certiorari

In every contest with CPN in *Snow Mountain I and II*, the Petitioner relied upon federal law. CPN argues that this was not so; but attaches to its Joint Brief an index of authorities from one of many Snow Mountain briefs. The attached index cites to numerous federal regulations. Often this reliance upon federal law was pointed out by CPN to the Oregon Courts in a manner which sought to

generate offense by the state court. CPN's assertion that Snow Mountain did not cite federal authority is incorrect.

The Supreme Court is presented with a joint brief which relies for argument upon the federal definition of avoided costs as being the cost which a utility would incur for generation or purchase from another source but for the purchase from a co-generation facility. In 1983 the Oregon P.U.C. found as a fact that CPN could not expect to purchase power form any other utility for the next 35 years. There was a finding that CPN was not an all-requirements utility. Further, the Oregon PUC adopted a policy that only setting avoided costs at the 'incremental' cost of building generation could encourage the construction of alternate energy supply facilities. As a consequence of these findings and policies, the Oregon PUC required CPN to file an estimate of generation costs parallel to those of Idaho Power Company, the lowest costs in the region.[8] In 1988, the Oregon PUC used the remand in this case to create a new 1983 guess of future costs for CPN. This new guess was based upon the assumption that CPN would continue to enjoy a low cost source of power for 35 years equal to historic average system costs of Idaho Power Company. This new estimate was labeled "actual avoided costs" and applied to Snow Mountain

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[8] Idaho Power Company did not participate in the nuclear power projects of the Washington Power Supply System. Idaho Power relies almost entirely upon cheap hydro-electric power, in large part supplied from dams built on the Snake River by the federal government.

alone. At the same time, the Oregon PUC was supporting CPN's applications to pass through to ratepayers the same 1982-3 avoided costs which it was and is paying to Snow Mountain's competitors. In these proceedings, CPN and the Oregon PUC were arguing that the old avoided costs could prove to be accurate over time and that they were lawful.

This is not just a case of political influence obtaining a decision contrary to federal law. It is not a unique situation wherein a Commission wanted to change the rules of the game for one lumber mill. It is not just a case of discrimination. It is a case in which the Oregon Courts have affirmed these actions and thus redefined PURPA in a way which removes the teeth from this federal energy program. These decisions give the states a veto power over the program by allowing state commissions to ignore or alter at any time the posted avoided costs which federal law assures to cogenerators as the major incentive for offers of power from alternative energy sources. Since PURPA, a multi billion dollar industry of independant power producers has been created. Many of these companies are publicly traded. Their future is based upon the continuation of the contracts and PURPA rights which they were promised by law. Their projects are financed typically with loans secured by the expected streams of PURPA payments. *Snow Mountain II* allows the states to alter these prices almost at will based upon new "guesses" and "estimates" made at any time. In the process, the projects may be subjected to regulatory type scrutiny and the owners subjected to long and expensive proceedings.

The prospect that Oregon Trail Electric Consumers Cooperative, Inc., will ask the Oregon PUC to alter the

prices in all of its contracts is not the invention of Snow Mountain. Unless, this case is reviewed and corrected, a blueprint for litigation will have been created to frustrate any prospective PURPA sale and a loophole opened which will very likely be used to pry utilities loose from their past PURPA obligations.

The Joint Brief cites to oral argument from another case brought by petitioner against CPN.[9] This other case was brought in the alternative to this PURPA enforcement action for the damages arising by reason of the unlawful conduct of CPN in refusing to offer to purchase or wheel petitioner's power; by reason of the promises of CPN which induced Snow Mountain to purchase turbines; by reason of the discrimination afforded Snow Mountain by CPN; and by reason of the refusals by CPN to otherwise comply with PURPA. The Joint Brief correctly indicates that the action was dismissed on motion by CPN. The dismissal was based upon the same decision which is now appealed to this Supreme Court on the theory advanced by CPN; namely, that the unlawful actions of CPN were retroactively excused by reason of the Oregon PUC's Order which retroactively lowered CPN's avoided costs (as if the 1983 avoided costs had never been posted and never been of effect.) In other words, Snow Mountain

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[9] Joint Brief at page 7.

has been left with no remedy by reason of the retroactive change in rates and law.

April 7, 1991

Respectfully submitted,

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